90-403

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

JOSEPHINE A. ANDES,

Petitioner,

vs.

THEODORE R. KNOX,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1.

THE FOLLOWING DATES ARE UNDISPUTED IN THE RECORD:

12/7/84	PETITIONER DISCOVERS THE WIRE-TAP
1/19/87	EFFECTIVE DATE OF 18 U.S.C. 2520(e), WHICH ESTABLISHED A TWO-YEAR STATUTE OF LIMITATIONS IN WIRETAP CASES
11/22/88	PETITIONER FILES SUIT IN THE DISTRICT COURT

THE QUESTION IS WHETHER PETITIONER'S SUIT IS TIMELY, WHERE THE CLAIM ARGUABLY ACCRUED MORE THAN TWO YEARS PRIOR TO JANUARY 19, 1987, THE EFFECTIVE DATE OF 18 U.S.C. 2520(e), BUT THE SUIT WAS FILED LESS THAN TWO YEARS AFTER THE EFFECTIVE DATE OF THE STATUTE.

DOES A PLAINTIFF'S CLAIM FOR CIVIL DAMAGES IN A WIRETAP CASE ACCRUE AS TO ALL POTENTIAL DEFENDANTS JOINTLY WHEN THE MERE EXISTENCE OF THE WIRETAP IS DISCOVERED (HERE, DECEMBER 7, 1984), AS SOME CIRCUIT COURTS OF APPEALS HAVE HELD, OR AS OTHERS HAVE HELD, DOES THE CLAIM ACCRUE AS TO EACH DEFENDANT INDIVIDUALLY ON THE DATE WHEN THE PLAINTIFF NOT ONLY KNEW OF THE WIRETAP'S EXISTENCE, BUT KNEW OR SHOULD HAVE KNOWN OF THE IDENTITY OF THE DEFENDANT (HERE, NO LATER THAN DECEMBER 26, 1987)?

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PRIOR OPINIONS IN THIS CASE

The opinion of the United States District Court for the Western District of Missouri in this matter is unreported, but appears in full in the Appendix at page 6.

The opinion of the United States Court of Appeals for the Eighth Circuit in this matter is reported at 905 F.2d 188, and appears in full in the Appendix at page 1.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on May 31, 1990, affirming the judgment of the United States District Court for the Western District of Missouri, dated June 2, 1989. The Court of Appeals thereafter denied a timely petition for rehearing on July 11, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS

18 U.S.C. Sec. 2520 Recovery of Civil Damages Authorized

(a) In general. Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) Relief. In an action under this section, appropriate relief includes--

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate caes; and

(3) a reasonable attorney's fee and other litigation costs reasonably in-

curred.

(c) **Computation of Damages.**

(1) [Section on damages for satellite signal interception omitted as not relevant]

(2) In any other action under this section, the court may assess as damages whichever is the greater of--

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) **Defense.** A good faith reliance on--

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law

enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) Limitation. A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

STATEMENT OF THE CASE

The facts which are relevant to this Petition for a Writ of Certiorari are best stated by a simple chronology of events:

1984 Petitioner Josephine A. Andes files an action in the Circuit Court of Jackson County, Missouri for dissolution of her marriage to her (now former) husband, John W. Frick. At a presently unknown time after the filing of the petition for dissolution of the marriage, Respondent Theodore R. Knox is hired by Mr. Frick, and in the course of that employment places, or causes to be placed, one or more electronic surveillance devices on Petitioner's telephone line at her home in Blue Springs,

Missouri.

12/7/84 Petitioner discovers the electronic surveillance device in her home.

6/20/85 John W. Frick, during a deposition in the dissolution proceeding, states under oath that Respondent Knox was hired only to follow Petitioner, and to take photographs of her. During the same deposition, when directly asked whether he had ordered or participated in the placing of the wiretap, Mr. Frick invoked his privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States. [Appendix at page 26]

9/24/85 The marriage of Petitioner and John W. Frick is dissolved.

10/23/86 Congress enacts the first

federal statute of limitations on actions for civil damages as a result of unlawful electronic surveillance, Public Law 99-508, Title I, Sec. 103, 100 Stat. 1854.

1/19/87 Public Law 99-508 becomes effective as 18 U.S.C. 2550(e).

12/26/87 Leslie Albin pleads guilty to criminal violations of 18 U.S.C. 2511 in the United States District Court for the Western District of Missouri and as a result implicates Respondent Knox and others with reference to the wiretapping of Petitioner's home.

11/22/88 Petitioner files this suit in the United States District Court for the Western District of Missouri, naming Leslie E. Albin and Theodore R. Knox as defendants. The court's

jurisdiction was invoked under 28 U.S.C. 1331. (Hereinafter, Andes I)

6/2/89 Honorable Howard F. Sachs grants summary judgment in favor of Defendants in Andes I, on the basis that Petitioner's claim is barred by 18 U.S.C. 2520(e).

6/23/89 A Notice of Appeal to the United States Court of Appeals for the Eighth Circuit is filed in Andes I.

11/30/89 Petitioner files suit in the United States District Court for the Western District of Missouri against her former husband, and several attorneys and law firms representing Mr. Frick in the dissolution proceedings, alleging that they participated in the wiretapping of her home. (Case No.

89-1119-CV-W-6) (Hereinafter, "Andes II")

3/28/90 Honorable Howard F. Sachs, grants summary judgment in favor of defendants in Andes II, on the ground that the suit is barred by 18 U.S.C. 2520(e).

4/25/90 A Notice of Appeal to the United States Court of Appeals for the Eighth Circuit is filed by Petitioner in Andes II. (Case No. 90-9017WM)

5/31/90 The United States Court of Appeals for the Eighth Circuit affirms the decision of the District Court in Andes I.

7/11/90 The Eighth Circuit denies Petitioner's Motion for Rehearing and Suggestions for Rehearing En Banc in Andes I.

REASONS FOR GRANTING WRIT

1. THE FOLLOWING DATES ARE UNDISPUTED IN THE RECORD:

12/7/84 PETITIONER DISCOVERS THE WIRETAP

1/19/87 EFFECTIVE DATE OF 18 U.S.C. 2520(e), WHICH ESTABLISHED A TWO-YEAR STATUTE OF LIMITATIONS IN WIRETAP CASES

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THE QUESTION IS WHETHER PETITIONER'S SUIT IS TIMELY, WHERE THE CLAIM ARGUABLY ACCRUED MORE THAN TWO YEARS PRIOR TO JANUARY 19, 1987, THE EFFECTIVE DATE OF 18 U.S.C. 2520(e), BUT THE SUIT WAS FILED LESS THAN TWO YEARS AFTER THE EFFECTIVE DATE OF THE STATUTE.

Factual Background

Petitioner discovered the wiretap on December 7, 1984, at a time when there was no federal statute of limitations on

filing suits for civil damages under the wiretap statute. Two years and forty-three days later, on January 19, 1987, 18 U.S.C. 2520(e) became effective, creating a two-year statute of limitations for civil damage suits arising out of unlawful electronic surveillance. One year, ten months and twelve days after the effective date of 18 U.S.C. 2520(e), Petitioner filed her suit. Both the trial court and the Eighth Circuit held her suit was untimely.

Conflict with Prior Decisions of this Court

In Sohn v. Waterson, 84 U.S. (17 Wall.) 596 (1873), this Court analyzed three options for resolving the application of a new statute of limitations to claims that accrued prior to the effective date of the statute. The first option, which was rejected, was to make the statute applicable only to claims arising after the effective date, thus leaving

prior claims with no statute of limitations. The second option, also rejected, was to apply it to cases where the cause arose before the effective date, but there was still a reasonable amount of time left before expiration of the limitation period, with the courts determining what was reasonable.

The third option, adopted by this Court, was to hold that for purposes of calculating the running of a new statute of limitations, the cause of action accrued on the date the cause was first subjected to the statute. Id. at 600. See also, Lewis v. Lewis, 48 U.S. (7 How.) 776, 778-79 (1849).

As recently as 1988, the Eighth Circuit relied on both Sohn and Lewis to bar a seaman's suit when the critical dates were an injury in March of 1980, a new three-year statute of limitations in October of 1980, and a suit filed in February of 1987. This interpretation,

i.e., that the plaintiff had until October of 1983 to file his suit, was found appropriate as a means to prevent application of the statute to the claim from being both retroactive and unconstitutional. Reynolds v. Heartland Transportation, 849 F.2d 1074, 1075 (8th Cir. 1988).

Andes II is another case arising out of the same wiretap incident, but against different defendants, which was filed in the Western District of Missouri on November 29, 1989, and is presently on appeal to the Eighth Circuit. (Petitioner does not herein waive, and specifically reserves, all factual and legal arguments available to her in Andes II.) The same trial judge, less than 10 months after his decision in Andes I, granted summary judgment for the Andes II defendants, holding that under Reynolds, Petitioner's failure to file by January 19, 1989 (within two years of the effective date

of 18 U.S.C. 2520(e)) made the suit untimely. [Appendix at 17-18] Thus, at least in the Western District of Missouri, Petitioner's suit could only have been timely filed if it was filed by December 7, 1986--more than a month before the statute of limitations went into effect.

There being a clear and direct conflict between the still-vital holdings of Sohn and Lewis, supra, it is respectfully suggested that this Petition for a Writ of Certiorari to the Eighth Circuit should be granted.

Retroactive Application of the Statute

There are two bases for arguing that the issue of whether the statute of limitations was applied retroactively, is properly before this Court.

The first is that under Supreme Court Rule 14.1(a), each "question presented will be deemed to comprise every subsidiary question fairly included

therein." As stated by the Eighth Circuit in Reynolds, supra, the rationale of Sohn, supra, is used to avoid the simultaneous results of retroactivity and unconstitutionality. The issue is legitimately raised.

The second basis is the "plain error" doctrine, whether under Rule 51, Fed. R. Civ. P., or Supreme Court Rule 24.1(a). In Carlson v. Green, 446 U.S. 14, 15, 100 S. Ct. 1468, 1470 (note 2), 64 L. Ed.2d 15 (1980), this Court considered an issue not presented in either the District Court or the Court of Appeals because it was an important, recurring issue and was properly raised in another petition for certiorari. While Petitioner's case in Andes II has not yet been decided by the Eighth Circuit, if it is again adverse, another petition for certiorari will be filed, raising essentially the same issues, although in a somewhat different factual context. The

issue of when a cause of action accrues under the wiretap statutes, especially when considering the secrecy inherent in the activity, is certainly both important and recurring, and thus warrants a decision by this Court.

In City of Newport v. Fact Concerts, Inc., 453 U.S. 245, 255, 101 S. Ct. 2748, 2754, 69 L. Ed.2d 616 (1981), the Court commented that Rule 51 review is "suited to correcting obvious instances of injustice or misapplied law." Given the fact that Petitioner's suit was filed less than two years after the enactment of a new two-year statute of limitations, granting summary judgment on the basis that the suit was untimely, and thus preventing her from presenting her claims to a jury, is an obvious instance of both injustice and misapplied law.

In United States v. Atkinson, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555 (1936), this Court held:

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.

When a Court of Appeals upholds a District Court decision that a new two-year statute of limitations terminated and barred a cause of action forty-three days before the statute became effective, it is suggested that the error is not only obvious, but one that affects both the fairness and integrity of judicial proceedings.

With regard to the retroactivity of statutes, this Court has held that even where retroactivity might be permissible, it is not a favored interpretation, "except upon the clearest mandate,"

Claridge Apartments Company v. Commissioner of Internal Revenue, 323 U.S. 141, 164, 65 S. Ct. 172, 185, 89 L. Ed. 139 (1944), and:

> ...the first rule of construction is that legislation must be considered as addressed to the future, not to the past * * * [and] a retrospective operation will not be given to a statute which interferes with antecedent rights * * * unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." [Citations omitted]

Greene v. United States, 376 U.S. 149, 160, 84 S. Ct. 615, 621-22, 11 L. Ed.2d 576 (1964).

In the only other reported decision construing 18 U.S.C. 2520(e), Scutieri v. Estate of Revitz, 683 F. Supp. 795, 799 (S.D. Fla. 1988), the District Court held:

> ...not only does this act not purport to operate retrospectively, but, the act provides that "amendments by this act are effective 90 days after enactment." [Citation omitted] Without a clear statement indicating the legislature intended to apply the new two-year statute of limitations retrospectively, the court will not apply the 1986 amendment to 18 U.S.C. Sec. 2511 retrospectively...."

Applying these principles to Andes I, it is suggested that the District Court's decision that the statute barred Petitioner's cause of action, simply because the claim arguably accrued more than two years prior to the effective date of the statute, is an obvious retroactive application of the law, which is not supported by any indication from the Congress of that intent. Such a retroactive application is, on its face,

a denial of Petitioner's rights of due process under the Fifth Amendments, and particularly under the Taking Clause in the Fifth Amendment.

Question 1 Summary

The decisions in this case in the District Court and the Eighth Circuit directly conflict with this Court's decisions in Sohn, and Lewis, supra, and by foreclosing Petitioner's claim, thereby amount to a retroactive and thus unconstitutional application of 18 U.S.C. 2520(e) to Petitioner's cause of action. Reynolds, supra. For these reasons, the Writ of Certiorari should be granted.

2. DOES A PLAINTIFF'S CLAIM FOR CIVIL DAMAGES IN A WIRETAP CASE ACCRUE AS TO ALL POTENTIAL DEFENDANTS JOINTLY WHEN THE MERE EXISTENCE OF THE WIRETAP IS DISCOVERED (HERE, DECEMBER 7, 1984), AS SOME COURTS OF APPEALS HAVE HELD, OR AS OTHERS HAVE HELD, DOES THE CLAIM ACCRUE AS TO EACH DEFENDANT INDIVIDUALLY ON THE DATE WHEN THE PLAINTIFF NOT ONLY KNEW OF THE WIRETAP'S EXISTENCE, BUT KNEW OR SHOULD HAVE KNOWN OF THE IDENTITY OF THE DEFENDANT (HERE, NO LATER THAN DECEMBER 26, 1987)?

Background

During a substantial portion of 1984, Petitioner was involved in a bitter divorce in the Circuit Court of Jackson County, Missouri. On December 7, 1984, she discovered a wiretap in her home. Between then and the actual dissolution of her marriage in late 1985, she assumed that her then-husband, John W. Frick, was

responsible for the wiretap. [Legal File in the Eighth Circuit at 52: excerpt from Petitioner's deposition in the divorce proceedings on August 30, 1985] Mr. Frick's deposition was also taken on June 20, 1985 [Appendix at 23], during the course of which he perjured himself by claiming that Respondent had only been hired to follow Petitioner and take photographs, and then, when asked about his direct involvement with the wiretap, availed himself of his Fifth Amendment right against self-incrimination. [Appendix at 23-26]

On December 26, 1987, Leslie Albin pleaded guilty to various wiretap charges under 18 U.S.C. 2511, in United States v. Albin, No. 88-00283-01-CR-W-6. It was as a result of that guilty plea, Petitioner has alleged in her complaint, that she first became aware of the identities of at least some of the participants in the wiretap other than her assumption her

husband was involved. She filed suit within less than a year of acquiring this knowledge.

The District Court held that Petitioner's claim accrued in 1984 the day she found the wiretap, and inferentially found that she "knew" (her word was "assumed") in at least mid-1985 that her husband was responsible. The District Court then reasoned that she could have filed suit against Mr. Frick and used the discovery process to learn the identities of the other tortfeasors, thus preserving her claims against all of them.

Wiretap Accruals:

Conflicts and Confusion

Comparatively few cases have directly addressed the issue of when a cause of action accrues in a wiretap case. In Brown v. American Broadcasting Company, Inc., 704 F.2d 1296, 1304 (4th Cir. 1983), the Fourth Circuit applied the discovery rule, i.e., "when the plaintiff

discovers, or by the exercise of due diligence could have discovered, that his communications have been intercepted." Yet in the paragraph after the definition of that rule, id., the court implicitly acknowledged the importance of knowing the identity of the tortfeasor:

> Electronic surveillance is by its very nature a tort which is concealed from a potential plaintiff. Unless the defendant discloses his activity to the plaintiff, or uses the information he obtains in a way which should put the plaintiff on notice of his activity, the tort may be concealed.

Citing Brown, supra, the Tenth Circuit discussed but did not decide which of the two options to apply to the facts in Newcomb v. Ingle, 827 F.2d 675, 679 (10th Cir. 1987) since under either rule the suit was untimely.

The District of Columbia Circuit

adopted the discovery rule in Smith v. Nixon, 606 F.2d 1183, 1190 (D.C. Cir. 1979). However, under the facts of that case, the discovery of the existence of the wiretap and of the identity of the tortfeasor were simultaneous, as a result of a newspaper article some six years after the actual wiretapping. There was thus no issue relating to the identity of the tortfeasors.

Awbrey v. Great Atlantic & Pacific Tea Company, Inc., 505 F. Supp. 604, 609 (N.D. Ga. 1980), applied the "discovery of the wiretap" rule--but again in a factual context where the discovery of both the wiretap and the identity of the wiretapper were simultaneous. Cole v. Kelley, 438 F. Supp. 129, 138 (C.D. Cal. 1977), applied the discovery rule, but again wiretap/wiretapper discovery also occurred simultaneously.

Under Andes I, of course, the date of discovery is the date of accrual. The

only other case directly dealing with the same issue raised in Andes I, i.e., the lack of knowledge of the identity of multiple tortfeasors in a wiretap setting, is Pavlak v. Church, 727 F.2d 1425 (9th Cir. 1984). The Ninth Circuit cites virtually all of the above cases, at 1428, as standing for the principle that the statute of limitations begins to run when a plaintiff knows, or should know, "the basis of the cause of action." The court then applied that principle to a fact situation in which the plaintiff alleged that she did not know of the involvement on the telephone company until more than two years after her cause of action accrued against the other defendants. Implicitly, the court held that if she could prove that assertion, id., her claim would not be barred:

> Whether Pavlak should have through reasonable diligence recognized her cause of action against

> Mountain States earlier is a question of fact, and whether Mountain States' involvement was concealed by the other defendants is relevant to such an inquiry on remand. [Citations omitted]

There is thus a direct conflict between the Eighth and Ninth Circuits on the issue of whether, in a wiretap case, the cause of action accrues against all joint tortfeasors simultaneously as of the discovery of the wiretap, or whether the cause accrues sequentially against individual defendants depending upon the time at which the plaintiff knew or could have known of the involvement of the particular defendant in the wiretap activities.

Accrual of causes of action under federal statutes are clearly a recurring theme in litigation in the federal judicial system. It would therefore be appropriate to resolve the direct conflict

between the Eighth and Ninth Circuits, and the indirect conflicts between the Ninth and the Fourth, Eighth, Tenth and District of Columbia Circuits.

United States v. Kubrick: Conflicts and Confusion

It is suggested that because of the peculiar and secretive nature of electronic surveillance, in which all a tortfeasor has to do is to remain silent to be reasonably assured of being immune to suit (because his identity can't be learned and he therefore cannot be served with a complaint), the proper standard for determining when accrual takes place is that enunciated in United States v. Kubrick, 444 U.S. 111, 100 S. Ct. 352, 62 L. Ed.2d 259 (1979): a plaintiff must know not only what was done to him, but who did it. Id., 444 U.S. at 122, 100 S. Ct. at 359.

This raises two questions: does Kubrick apply to cases other than medical

malpractice arising under the Federal Tort Claims Act, and if so, is the "who" language part of the holding, and therefore binding, or merely dicta?

The first is comparatively easy to answer. The weight of authority in the lower courts is that Kubrick can be applied to determine the time of accrual in other types of litigation.

In Dubose v. Kansas City Southern Railway Company, 729 F.2d 1026 (5th Cir. 1984), the court held at 1030:

> The Kubrick rule, we think, represents the Court's latest definition of the discovery rule and should be applied in federal cases whenever a plaintiff is not aware of and has no reasonable opportunity to discover the critical facts of his injury and its cause.

Earlier, the Fifth Circuit also held:

> ...the Supreme Court has rejected the standard which would allow the

> statute of limitations to commence running before the plaintiff was or should have been aware of the causal connection between his injury and the acts of defendants. Until the plaintiff is in possession of the "critical facts that he has been hurt and who has inflicted the injury," [citing Kubrick], the statute of limitations does not commence to run.

Lavellee v. Listi, 611 F.2d 1129, 1131 (5th Cir. 1980).

In a particularly well-reasoned opinion, the trial court in Liuzzo v. United States, 485 F. Supp. 1274 (E.D. Mich. 1980) applied Kubrick to a civil rights case involving the murder of Mrs. Liuzzo during the 1965 civil rights march in Selma, Alabama. Mrs. Liuzzo's children believed that with the successful prosecution of three members of the Ku Klux Klan for civil rights violations,

that the murderers had been punished. It was not until ten years later that the publication of a Senate report revealed that a government informant who had been the chief witness against the three had been lying, and that both he and FBI agents were involved in the death. Applying the what/who analysis, the claims against the new defendants was not barred.

Other courts have, without significant discussion, applied Kubrick to non-medical malpractice cases: Barrett v. United States, 689 F.2d 324 (2d Cir. 1982) (wrongful death); Blanton v. Anzalone, 760 F.2d 989 (9th Cir. 1985) (ERISA); Norris v. Wirtz, 818 F.2d 1329 (7th Cir. 1987) (securities); Mullinax v. McElhenney, 817 F.2d 711 (11th Cir. 1987) (civil rights); Knapp v. United States, 636 F.2d 279 (10th Cir. 1980) (Quiet Title Act).

The second and more important

question is whether this Court intended the issue of the identity of the tortfeasor to be an integral part of the equation used to calculate an accrual date. Some of the lower courts have expressly held that it is, or applied Kubrick in that fashion, while others have directly or indirectly rejected that approach.

The Third Circuit expressly rejected the "who" concept, and held that accrual occurs when a plaintiff simply knows "what", i.e., the fact of injury and the physical cause of injury. Zeleznik v. United States, 770 F.2d 20, 23 (3d Cir. 1985). The Ninth Circuit rejected the "who" concept in Gibson v. United States, 781 F.2d 1334, 1344 (9th Cir. 1985). The case involved FBI agents who allegedly participated in an arson plot against the plaintiffs. The court held:

> Language in Kubrick, emphasizing the strategic importance to the litigant of knowing whom to sue,

supports plaintiffs' proposed construction. See 444 U.S. at 122, 100 S. Ct. at 359 ("the prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury"). However, binding circuit precedent forecloses us from considering such an extension of Kubrick.

The binding precedents were essentially two decisions holding that the "cause is known when the immediate physical cause of injury is discovered." Dyniewicz v. United States, 742 F.2d 484, 486 (9th Cir. 1984) and Davis v. United States, 642 F.2d 328, 331 (9th Cir. 1981). See also, Outman v. United States, 890 F.2d 1050, 1052 (9th Cir. 1989).

The Sixth Circuit has held that the "who" language was purely dicta, and that Kubrick is tied solely to issues of fraudulent concealment. Dominnie v.

United States, 728 F.2d 301, 304 (6th Cir. 1984).

The Eighth Circuit, while not expressly addressing the issue in Andes I, can be seen to be a "what" circuit nevertheless, since it holds that the cause accrued when the wiretap was discovered, and that Petitioner should have filed suit against her former husband and used the discovery procedures to learn the identity of the additional defendants.

The First, Second, Fourth, Fifth, Seventh, and Eleventh Circuit Courts of Appeals have all applied the what/who analysis in Kubrick.

In Marrapese v. Rhode Island, 749 F.2d 934 (1st Cir. 1984), the plaintiff was unlawfully arrested in 1975 and tested for connection with a crime by application of benzidine to a substantial part of his body. His attorney was present, and even threatened a civil rights suit at the time of the testing. In 1980

a newspaper article discussed a link between cancer and benzidine. Plaintiff filed suit in 1980, but his own evidence showed that benzidine was known in 1975 to be carcinogenic. At 934, the First Circuit applied the what/who analysis and found that plaintiff's civil rights suit was barred because he knew in 1975 both what had been done to him (various civil rights violation regarding the arrest, in addition to the test) and who did it (the police).

In Barrett, supra, at 328, the Second Circuit applied Kubrick to a wrongful death case in which the decedent's death in 1950 was the result of being injected by Army doctors with a chemical derivative of mescaline, i.e., he was an unknowing volunteer/"guinea pig" in a chemical warfare program. The plaintiff daughter had no knowledge of the Army's involvement in her father's death until the government released reports in 1975.

In Gould v. United States Department of Health & Human Services, 884 F.2d 785 (4th Cir. 1989), the Fourth Circuit applied Kubrick to determine that Mrs. Gould's action for the death of her husband accrued against the doctors when she learned that they were federal employees (even though all the events took place in a private hospital).

In Lavellee v. Listi, supra, the case was essentially medical malpractice, and in the process of applying Kubrick, the Fifth Circuit commented at 1131, note 5:

> It might be argued...that the standard for accrual of a cause of action, although federal law under each act, varies from act to act: No such argument has been made here, and prior cases under one federal act have relied on cases under other federal acts concerning accrual of causes of actions. [Citations

omitted] We therefore must assume that the federal standard for accrual of claims does not vary among these statutes, and we are fully justified in relying on cases under those other acts. Kubrick is especially relevant because the claim there, like the primary one here, essentially alleges medical malpractice.

See also, Dubose, supra.

In Nemmers v. United States, 870 F.2d 426 (7th Cir. 1989), a child had been born in 1973 with mental retardation and cerebral palsy (Eric). His parents received a report from a physician in 1977 about possible causes. In 1981 they saw a newspaper article which revealed that improper care before and during birth had resulted in similar injuries to another child. Their suit was filed within two years of this knowledge (the relevant statute of limitations being two

years). Under Kubrick, the District Court applied an objective test to determine whether, on the basis of the 1977 report, a reasonable person in the parents' position would have known enough to identify negligent treatment before and during delivery as a potential cause for the boy's condition. The conclusion was that the 1977 report "would not cause a reasonable person to conclude, or even suspect, that Eric may have been injured as a result of the conduct of the Defendant's medical personnel...." Id. at 428.

In Mullinax v. McElhenney, supra, the Eleventh Circuit relied on Lavellee, supra, and Kubrick, to hold at 716:

> Section 1983 actions do not accrue until the plaintiff knows or has reason to know that he has been injured. [Citations omitted] Nor will a Section 1983 action accrue until the plaintiff is aware or

should have been aware who has inflicted the injury. [Citations omitted]

The District of Columbia Circuit, while not citing Kubrick, nevertheless has used a similar analysis to hold:

> ...plaintiff's knowledge of the grounds for a suit must generally extend to an awareness of the persons responsible for plaintiff's injury. We by no means imply that a plaintiff may postpone suit until he knows every defendant by name and title. However, simply because a person knows he has been injured by one person cannot reasonably mean he should be held to know of every other participant.

Hobson v. Wilson, 737 F.2d 1, 35-36 (D.C. Cir. 1984), citing Richards v. Mileski, 662 F.2d 65 (D.C. Cir. 1981) and Fitzgerald v. Seamans, 553 F.2d 220 (D.C. Cir. 1977).

Application of Kubrick to this case

In order to initiate litigation, a plaintiff must be able to plead four things: (1) an act or failure to act; (2) damage resulting from that act or failure to act (whether presumed in law or express); (3) that one or more specific defendants performed or failed to perform the act, and (4) a theory on which to base recovery against the defendant(s).

In a hit and run case, the plaintiff knows the act (an automobile striking a parked car late at night on a well-lit street); the damages ($2,000 to repair the left side of the car) and the theory of recovery (negligent driving). The plaintiff, however, is missing a critical element: who caused the injury. And simply by keeping silent, the defendant may never be known, and never be held accountable for his actions.

In the Kubrick medical malpractice

context, this Court specifically rejected an accrual calculation based on when a prospective plaintiff had knowledge of a theory of recovery, confining it instead to knowing what was done (a combination of the act and the damages) and who did it.

> We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has

inflicted the injury. He is no longer at the mercy of the latter. Kubrick, supra, 444 U.S. at 122, 100 S. Ct. at 359.

Electronic surveillance is by its very nature surreptitious; it is an even more secretive tort than medical malpractice. A wiretap device placed on a telephone may never be discovered before its removal, or it may be discovered by accident after months of operation, as in this case. Discovery of the wiretap is the "manifestation of the injury" and the damages arise out of the minimum civil penalties established by Congress for violations of the wiretap statute, plus allowing the recovery of punitive damages. In a wiretap case, the "facts about causation" are even more strongly under the control of the putative defendant. Whereas medical records might reveal causation in a medical malpractice case and link the action to a particular physi-

cian, in a wiretap case there are no records a plaintiff can turn to. There is no convenient "dog tag" attached to the device; it is simply there, anonymously. It is only when someone with knowledge of who placed the device, or who caused it to be placed, breaks silence, that a plaintiff can hope to learn the identities of potential defendants.

The District Court and the Eighth Circuit have held that Petitioner in essence had knowledge of both "what" and "who" (her former husband, at least) soon after she discovered the device. And therefore, she should have filed suit against him and used discovery procedures to learn the identities of the other tortfeasors. This analysis is incorrect on two counts.

First, as Petitioner testified, she simply "assumed" her husband had placed the device. She knew information was in the hands of her husband's attorneys but

she had no reasonable basis for determining that he had been responsible for placing the device.

> In assessing the awareness required to trigger the statute of limitations, it is essential to distinguish between "knowledge" and "belief." For one to have knowledge of fact "x," three requisites must be exist: (1) "x" must be true, (2) the person must believe "x" to be true, and 93) the belief must be reasonably based. [Citations omitted] "Belief," which is a component of knowledge, requires only requisites (1) and (2)--"x" must be true and the person must believe it to be true. As a consequence, conclusions based on dreams, intuitions, suspicions, conjecture, ESP, speculation, or faulty reasoning, even if true, are merely "belief." Absent a reasonable basis, these

conclusions do not arise to the level of "knowledge."

Harrison v. United States, 708 F.2d 1023, 1027 (5th Cir. 1983).

It is suggested that an assumption falls somewhere between intuition and ESP in the knowledge spectrum, and she did not therefore know the "who" with sufficient certainty to trigger running of the statute of limitations.

The second fault in the reasoning of the courts below is the assertion, unsupported by fact or law, that Petitioner could have learned of the identity of Respondent through pre-trial discovery by suing Mr. Frick. Yet given Mr. Frick's willingness to perjure himself on the involvement of Mr. Knox and to take the Fifth Amendment with regard to his own involvement how can it be said as a matter of law that she could have learned of the identity of Mr. Knox (sued in Andes I) or the other tortfeasors (sued in

Andes II) from this source? It was not until Mr. Albin's guilty plea broke the silence surrounding the placing of the device that Petitioner had any opportunity to learn who in fact had been responsible for the wiretap.

Question 2 Summary

Although the weight of authority in the Circuit Courts of Appeals is that Kubrick is of general applicability outside the context of medical malpractice claims, there is a sharp split among the Circuits as to the proper interpretation of the what/who analysis in a variety of cases arising under federal law. The cases cited herein are simply the tip of an iceberg of a growing body of law dealing with the proper method of determining accrual dates under a wide range of statutes. Under Supreme Court Rule 10.1(a), the decision in Andes I is in direct conflict with the Ninth Circuit decision in Pavlak, supra. The issue of whether a

cause of action under the wiretap statutes against multiple defendants accrues for all of them simultaneously, or in certain circumstances, sequentially as their involvement is learned, is a recurring one. This is especially so, as Andes II, given the decision of the Eighth Circuit in this matter (Andes I), will almost certainly give rise to another Petition for a Writ of Certiorari since the facts are somewhat different, and the suit was filed more than two years after the effective date of 18 U.S.C. 2520(e), but less than two years after Mr. Albin's guilty plea on December 26, 1987, opened the door to learning the identities of those responsible for the electronic surveillance of Petitioner's home. For these reasons, the Writ of Certiorari should be granted.

CONCLUSION

A direct conflict exists between a decision of the Eighth Circuit (Andes I) and a decision of this Court (Sohn, supra). A direct conflict exists between Andes I and a decision of another Circuit on the same subject matter (Pavlak, supra). The question of the applicability of this Court's decision in Kubrick, supra, to non-medical malpractice cases arising under federal law is an important one that should be resolved by this Court but has not yet been answered. The question of the proper interpretation of the Kubrick "critical facts" analysis of what was done and who did it has sharply divided the Circuits, and as the question of when a federal cause of action accrues is constantly recurring, it is one that should be resolved by this Court so that there is uniformity within the federal judicial system on this subject.

For all the above reasons, Petitioner prays that the Court grant her Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2057

JOSEPHINE A. ANDES,	*	
	*	
Appellant,	*	Appeal from
	*	the United
	*	States Dis-
vs.	*	trict Court
	*	for the West-
	*	ern District
THEODORE R. KNOX,	*	of Missouri
	*	
Appellee.	*	

Submitted: March 16, 1990

Filed: May 31, 1990

Before FAGG and WOLLMAN, Circuit Judges, and DUMBAULD,* Senior District Judge

WOLLMAN, Circuit Judge.

Josephine A. Andes appeals the district court's[1] grant of summary judgment in favor of Theodore R. Knox in her action for damages for illegal wiretapping. We affirm.

I.

In 1984, Andes and her former husband, John W. Frick, were in the

process of dissolving their marriage. During this time, Knox and Leslie E. Albin, apparently private investigators hired by Frick, installed electronic wiretapping devices on the telephone lines leading to and inside Andes' residence with which to record Andes' private telephone conversations. Andes discovered the wiretapping in December 1984. In December 1987, Albin pleaded guilty to wiretapping. Until the time of Albin's guilty plea, Andes believed that it was Frick who had wiretapped her residence.

On November 22, 1988, Andes brought suit against Albin and Knox pursuant to 18 U.S.C. Sec. 2520, which provides a civil cause of action against those who intercept oral communications.[2] Knox filed a motion for judgment on the pleadings. Treating the motion as one for summary judgment, the district court granted summary judgment in favor of Knox, finding that the statute of

limitations in 18 U.S.C. Sec. 2520(e) had run, barring Andes' cause of action. Andes appeals.

II.

Section 2520(e), enacted in 1986, provides that "[a] civil action under [section 2520] may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation." Prior to 1986, section 2520 had no limitations provision.

We do not agree with Andes' contention that the limitations period should run from the date of Albin's plea agreement in 1987. Under section 2520(e) the cause of action accrues when the claimant has a reasonable opportunity to discover the violation, not when she discovers the true identity of the violator or all of the violators. We agree with the district court that there is no material issue of fact concerning when Andes

discovered the violation: the limitation period began to run in 1984 when Andes discovered the wiretapping. Andes was aware of a cause of action against Frick at that time. She could have sued Frick under section 2520 and sought the identity of other defendants through discovery. Therefore, we find that the limitations period had run by the time Andes filed her complaint in 1988.

Andes also contends that because section 2520 was first enacted in 1986, the district court should not have applied its limitations period retroactively to the wiretapping violation she discovered in 1984. Because Andes did not raise this argument in the district court, however, we will not consider it on appeal. See Kapp v. Naturelle, Inc., 611 F.2d 703, 709 (8th Cir. 1979).

The judgment is affirmed for the reasons set forth in the district court's opinion.

FOOTNOTES

* The HONORABLE EDWARD DUMBAULD, United States Senior District Judge for the Western District of Pennsylvania, sitting by designation.

1. The Honorable Howard F. Sachs, United States District Judge for the Western District of Missouri.

2. Andes dismissed the action as against Albin, having never served process upon him.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JOSEPHINE A. ANDES,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 88-1152-CV-W-6
	)	
LESLIE E. ALBIN and THEODORE R. KNOX,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

Plaintiff brings this suit pursuant to 18 U.S.C. Sec. 2520, which provides for the recovery of civil damages by victims of illegal wiretapping activities. In her Complaint, plaintiff alleges that between April and December 1984, defendants intercepted, disclosed or intentionally used the home telephone conversations of plaintiff Josephine Andes without her knowledge or consent. Complaint, Paragraphs 2 & 3. She further alleges that prior to December 29, 1987, the date on which defendant Leslie E.

Albin pleaded guilty to a criminal violation of 18 U.S.C. Sec. 2511(1)(a), plaintiff had no reasonable opportunity to discover either the violation or the fact that her rights under 18 U.S.C. Sec. 2511(1)(a) had been violated. Complaint, Paragraph 4. This cause presently pends before the court on the motion of defendant Theodore R. Knox for judgment on the pleadings.

BACKGROUND FACTS

During the time period beginning sometime in April 1984, and continuing through December, 1984, plaintiff Josephine A. Andes was involved in a divorce proceeding with former husband John W. Frick. At the time, plaintiff resided at 1724 North 11th Street, Blue Springs, Missouri. On or about December 7, 1984, plaintiff discovered electronic wiretapping devices upon the telephone lines leading to and inside her residence. Plaintiff's Suggestions in Opposition to

Defendant's Motion for Judgment on the Pleadings (Doc. No. 14), at 1. At the time of discovery, however, plaintiff alleges that she believed her former husband, John W. Frick, to be the only person responsible for the electronic wiretapping devices installed on her telephone lines. Doc. No. 14, at 2.

On December 26, 1987, defendant Leslie E. Albin entered a plea of guilty in the case styled United States of America v. Leslie E. Albin, Case No. 87-00283-01-CR-W-6. On that date, plaintiff alleges that she became aware for the first time of the identity of her former husband's "representatives." Id. Plaintiff claims that she had no reasonable opportunity to discover the identities of Albin and Knox prior to the entry of Albin's guilty plea.

JUDGMENT ON THE PLEADINGS

Defendant Knox has moved the court for judgment on the pleadings. In

support of his motion, Knox asserts that the limitations provision contained in 18 U.S.C. Sec. 2520(e) bars plaintiff's recovery in this action. Section 2520(e) provides that:

> A civil action brought under this section may not be commenced later than 2 years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

18 U.S.C. Sec. 2520(e). Since plaintiff commenced her civil action on November 22, 1988, nearly four years following the date on which she admittedly discovered the illegal wiretap in her Blue Springs home, defendant Knox seeks dismissal of the instant cause of action pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.[1] Because both parties have submitted matters outside the pleadings for the court's consideration, defendant's motion will be treated as one for summary judgment and disposed of as provided in Fed. R. Civ. P. 56.

STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Facts must be viewed in the light most favorable to the nonmoving party who must be given the benefit of all reasonable inferences which may be made from the facts disclosed in the record. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Raschick v. Prudent Supply, Inc., 803 F.2d 1497, 1499 (8th Cir. 1987), cert. denied, 108 S. Ct. 1111 (1988).

If a party is unable to make a sufficient showing as to some essential element of its case upon which it will bear the ultimate burden of proof at trial, all other facts are necessarily immateri-

al. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A part seeking summary judgment bears the initial burden of demonstrating to the court that an essential element of the nonmoving party's case is lacking. Id. The burden then shifts to the nonmoving party either to come forward with sufficient evidence to demonstrate that there is a factual controversy as to that element, or to explain why such evidence is not currently available. Id., Fed R. Civ. P. 56(f). The standard for determining whether a factual dispute is genuine is the same as the standard applied to motions for directed verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The nonmoving party must come forward with sufficient evidence to allow a reasonable jury to find in its favor. Id. at 251.

DISCUSSION

In support of his motion, defendant Knox submits copies of pleadings filed in

1984 in the Circuit Court of Jackson County, Missouri, where plaintiff's divorce action against former husband John William Frick was then pending. These pleadings clearly indicate that at the time of the divorce proceeding, plaintiff was already aware of the illegal wiretap which had been placed within her Blue Springs home. As noted above, however, plaintiff admits that she discovered the illegal wiretap on or about December 7, 1984.

Plaintiff contends that prior to the December 26, 1987, guilty plea entered by Leslie E. Albin in Case No. 87-00283-01-CR-W-6, she had no knowledge of defendants' participation in the illegal wiretap. Prior to the guilty plea, she allegedly knew only that her ex-husband, John W. Frick, or his representatives, had illegally installed an electronic wiretapping device on her telephone line. She argues that the

question of when she had actual knowledge of defendants Leslie E. Albin and Theodore R. Knox' participation in the installation of the electronic wiretapping device is a question of fact which should not be resolved by the court as a question of law. In support of her position, plaintiff submits deposition testimony of John W. Frick taken during the 1984 divorce proceedings in which Frick identifies Ted Knox as a private investigator hired only to follow plaintiff and to take photographs. See Exhibit C to Doc. No. 14. Additionally, plaintiff supplies her own deposition testimony given August 30, 1985, in which she states that she had knowledge of the illegal wiretap, but assumed that her exhusband, John Frick, was the person who had tapped her telephone. See, Exhibits F, H & I to Doc. No. 14.

Section 2520 was amended in 1986 to require that a lawsuit to recover civil

damages for illegal wiretap be brought no later than two years after the date upon which plaintiff first has a reasonable opportunity to discover the violation. 18 U.S.C. Sec. 2520(4). Prior to the amendment, numerous courts had held that a cause of action under Sec. 2520 accrues when plaintiff discovers, or with reasonable diligence should have discovered, the illegal wiretap. See, e.g., Pavlak v. Church, 727 F.2d 1425, 1426 (9th Cir. 1984); Brown v. American Broadcasting Co., Inc., 704 F.2d 1296, 1304 (4th Cir. 1983); Smith v. Nixon, 606 F.2d 1183, 1190 (D.C. Cir. 1979), cert. denied, 453 U.S. 912, reh'g. denied, 453 U.S. 928 (1981); Awbrey v. Great Atlantic and Pacific Tea Co., 505 F. Supp. 604, 609 (N.D. Ga. 1980). Defendant Knox contends that had plaintiff filed her Complaint in this cause within two years following her discovery of the illegal wiretap she, through exercise of reasonable diligence

during discovery, could have learned of defendants Knox and Albin's alleged participation in the installation of electronic surveillance equipment.

In Newcomb v. Ingle, the Tenth Circuit affirmed the district court's ruling that the filing of a motion to suppress intercepted recordings established the plaintiff's actual knowledge of a violation and, therefore, barred his Sec. 2520 claim. 827 F.2d 675, 679 (10th Cir. 1987). Newcomb had contended that Ingle had fraudulent concealed a conspiracy to use the tapes illegally in a criminal proceeding against plaintiff and that, therefore, the statute of limitations should be tolled. The court rejected plaintiff's argument, concluding that as set out in plaintiff's own pleadings, "there is no potential for a cognizable issue of fact on a theory of fraudulent concealment." Id. Here, as in Newcomb, there is no potential for a cognizable

issue of fact as to when plaintiff discovered a violation of Sec. 2520. Her suit is, therefore, barred by the applicable statute of limitations. Accordingly, defendant Knox' Motion will be GRANTED. SO ORDERED.

/s/ Howard F. Sachs
Howard F. Sachs
United States District Judge

DATED: June 2, 1989.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2057WM

JOSEPHINE A. ANDES,	*	
	*	
Appellant,	*	Order Denying
	*	Petition for
vs.	*	Rehearing and
	*	Suggestion for
THEODORE R. KNOX,	*	hearing En
	*	Banc
Appellee.	*	

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

July 11, 1990

Ordered entered at the direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JOSEPHINE A. ANDES,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	No. CV-1119-CV-W-6
	*	
JOHN W. FRICK, et al.,	*	
	*	
	*	
Defendants.	*	

MEMORANDUM AND ORDER

Plaintiff's complaint alleges that, between April and December 1984, defendants intercepted and disclosed her home telephone conversations without her consent, in violation of 18 U.S.C. Sec. 2520. Defendants have moved to dismiss, arguing that plaintiff's cause of action is barred by the two year statute of limitations found in Sec. 2520. 18 U.S.C. Sec. 2520(e).[1] The two year limitations period was added to the statute in a 1986 amendment which had an effective date of January 19, 1987. Public Law 99-508,

Sec. 111. The pending motions to dismiss contend that the limitations period for this action began on January 19, 1987, and that this action, filed in November 1989, is therefore barred.

In Reynolds v. Heartland Transportation, 849 F.2d 1074 (8th Cir. 1988), plaintiff, a seaman, brought suit under maritime law for personal injury. After he was injured, Congress enacted 46 U.S.C. Sec. 763a to provide a three year statute of limitations for such claims. Plaintiff filed suit more than three years after the limitations period was adopted. In dismissing his claim, the court wrote:

> It is obvious from the dates that appellant's injuries (on March 24, 1980) occurred before the enactment of Section 763a (on October 6, 1980). But it is also obvious that by the time appellant sued (on February 4, 1987), he had permitted the entire three year period specified in Section 763a to pass. Clearly he had a reasonable opportunity to sue (after the enactment of this statute

> of limitations) before the three year statute could have operated to cut off his action.
>
> We believe that such a reasonable opportunity to sue before the statute could have foreclosed his suit suffices to prevent application of the statute to his case from being retroactive and unconstitutional.

Id. at 1075. The two year statute of limitations in Sec. 2520 commenced with the effective date of the amendment and, if applicable, bars plaintiff's lawsuit. The quoted language demonstrates that there is no constitutional problem with applying Sec. 2250(e) [sic] to this lawsuit, and that the Eighth Circuit has approved application of a subsequently enacted limitations period in similar circumstances.

While the Reynolds rationale appears to foreclose plaintiff's claim, several points should be addressed. In Scutieri v. Estate of Revitz, 683 F. Supp. 795 (S.D. Fla. 1988), the court refused to

apply Sec. 2520(e) to bar a claim which had accrued in 1980 and was timely filed, under Florida law, in 1984, holding that Congress did not intend the new limitations period to apply retroactively. The present matter, however, does not involve retroactive application. Section 2250(e) [sic] is merely being applied to a pre-existing cause of action and this is permissible. Sohn v. Waterson, 84 U.S. 596 (1873).

Plaintiff also contends that, because there was no specific limitations period in effect when the telephone conversations were intercepted, the most closely analogous state law applies. Newcomb v. Ingle, 827 F.2d 675 (10th Cir. 1987). If the Missouri five year period governs, Sec. 516.120, R.S.Mo., this action is arguably timely. Plaintiff cites Kotval v. Gridley, 698 F.2d 344 (8th Cir. 1983), in which the court, construing South Dakota law, applied the six year

statute of limitations which prevailed at the time plaintiff's cause of action accrued rather than the three year period subsequently adopted by the South Dakota state legislature. The issue in Kotval involved a change in the limitations period under South Dakota law for a cause of action based on South Dakota law. Kotval provides no guidance where a subsequently enacted and specific federal limitations period conflicts with state law in an action grounded exclusively in federal statute. There is no assertion that Congress intended that state limitations periods apply as long as possible, so there is no reason to consider Missouri law. Even if Missouri law provided the limitations period in 1984, "[a] litigant has no vested right to maintenance of the status quo existing at the time of his injury with respect to the time within which a legal remedy remains available." Reynolds, 849 F.2d at 1075.

Accordingly, it is hereby

ORDERED that the motions to dismiss filed by defendants Paden, Welch, Martin and Albano, P.C., John W. Frick, Rose Anne Nespica, Robert L. Trout, and Trout and Nespica are GRANTED and this matter is DISMISSED in its entirety.

/s/ Howard F. Sachs
Howard F. Sachs
United States District Judge

DATED: March 28, 1990.

FOOTNOTES

1. While the cause of action does not accrue until a plaintiff "first has a reasonable opportunity to discover the violation," the date of discovery is not an issue presented by plaintiff, as it was in Andes v. Albin, et al., No. 88-1152-CV-W-6.

EXCERPT FROM THE DEPOSITION OF JOHN WILLIAM FRICK (taken June 20, 1985)

(Pages 48 - 50 in the Legal File in the United States Court of Appeals for the Eighth Circuit)

NOTE: This deposition was taken in the matter of Andes v. Andes, No. DR 84-1285, in the Circuit Court of Jackson County, Missouri. The questions which follow were propounded by Charlotte Thayer, attorney for Josephine Andes. Mr. Frick was represented at the deposition by attorneys Rose Anne Nespica and Michael Albano.

A She has been seen dating Bob McDaniels.

Q What do you mean she's been seen dating him? Explain that to me.

A Someone followed her. They went to a restaurant and went to a movie.

Q Who followed her?

A Ted Knox.

Q Who is Ted Knox?

A He's a private investigator.

Q Someone you employed to follow her?

A Yes.

Q When did you first employee [sic]

him to follow Jo Ann?

A Right after we separated.

Q And how recently has he followed her?

A That was basically it. I found out, you know, what I wanted to know as far as whether or not I could make the relationship--whether she was being honest with me. And I basically knew before that. But I guess you just want to know for sure.

Q How much money have you paid Ted Knox?

A I don't remember. It was probably about--I don't remember. $300 or $400.

Q Did you employ Ted Knox to do anything other than follow Jo Ann?

A No. Oh, he took some pictures.

Q When did he take pictures?

A The day he followed her.

Q The day? He followed her only one day?

A I really don't know how often he followed her. But I know, you know, he told me about Bob McDaniels, and he took pictures on that day.

Q Pictures of Jo Ann going out to dinner and going to a show?

A Yes. And it was like a week after we were separated or very shortly thereafter.

Q And you think that's evidence she was having an affair with Bob McDaniels?

A Well, as I said when you said had she had relationships, I said, "I don't know how far you want to go."

Q Do you consider that she was having an affair with Bob McDaniels?

A No. I'd say that was a date.

Q All right. Did Ted Knox take pictures of Jo Ann with anyone else?

A No. Not that I know of.

Q Did he follow her when she was involved in any activities with anyone

else?

A Not to my knowledge.

Q Did a person named DeMoe, under either the direction of Ted Knox or directly for you, follow or otherwise attempt to obtain information on Jo Ann's activities?

A He didn't do anything under my direction, nobody by that name.

Q You know who this man is; do you not?

A I know who DeMoe is.

Q Does Ted Knox have an occupation, other than as a detective, private detective?

A I don't know.

Q You don't know whether he is employed by a police department?

A No.

MS. THAYER: I'd like to take a break for a few minutes.

(A recess was taken.)

Q (By Ms. Thayer) Mr. Frick, did you

ever cause any wiretapping devices to be established in the home at 1724 North 11th Street Court?

A I wish to invoke the Fifth Amendment privilege against self-incrimination, and I decline to answer that question on the grounds that it might tend to incriminate me.

(2)

No. 90-403

In The

Supreme Court of the United States

October Term, 1990

JOSEPHINE A. ANDES,

Petitioner,

v.

THEODORE R. KNOX,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1.

DID THE COURTS BELOW PROPERLY CONCLUDE THAT THE CAUSE OF ACTION ACCRUED AT THE TIME PETITIONER DISCOVERED THE EXISTENCE OF THE WIRETAP, REGARDLESS OF PETITIONER'S KNOWLEDGE OR LACK OF KNOWLEDGE OF RESPONDENT'S INVOLVEMENT IN SAID ALLEGEDLY ILLEGAL WIRETAP, THEREBY BARRING HER ACTION UNDER 18 U.S.C. § 2520, PURSUANT TO THE APPLICABLE STATUTE OF LIMITATIONS?

2.

CAN ARGUMENTS AND THEORIES RAISED BY PETITIONER THAT WERE NOT BEFORE THE DISTRICT COURT BE CONSIDERED FOR THE FIRST TIME ON APPEAL?

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STATUTES INVOLVED IN CASE

18 U.S.C. § 2511(1)

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who –

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when –

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2520(a)

§ 2520. Recovery of civil damages authorized

(a) In general. – Except as provided in section 2511(a)(ii), any person whose wire, oral, or

> electronic communication is intercepted, disclosed, or intentionally used *in violation of this chapter* may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(Emphasis added).

(Remaining portions of § 2520 set forth in the Petition.)

47 U.S.C. § 415(b)

§ 415. Limitation of actions

> (b) All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section.

Mo. Ann. Stat. § 516.140 (Vernon Supp. 1989)

§ 516.140. What actions within two years

> Within two years: An action for libel, slander, assault, battery, false imprisonment, criminal conversation, malicious prosecution, or actions brought under section 290.140, RSMo. An action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, and for the recovery of any amount under and by virtue of the provisions of the Fair Labor Standards Act of 1983 and amendments thereto, such act being an act of Congress, shall be brought within two years after the cause accrued.

Cal. Civ. Proc. Code § 340(3) (West 1982)

§ 340. [Personal injury; Wrongful death; Torts; Statutory penalties; Check payment by bank; Property seizure; Good faith improvements]

Within one year:

(3) An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in Section 4826 of the Business and Professions Code, for such a person's neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding such animal or fowl or in the course of the practice of veterinary medicine on such animal or fowl.

Md. Ann. Code § 5-105 (1957)

§ 5-105. Assault, battery, libel, or slander.

An action for assault, battery, libel, or slander shall be filed within one year from the date it accrues.

COUNTERSTATEMENT OF THE CASE

Petitioner filed her action to recover damages under 18 U.S.C. § 2520 on November 22, 1988. In that complaint, Plaintiff alleged that between April, 1984 and December, 1984, Respondent, Theodore R. Knox, among others,

intercepted, disclosed, or intentionally used the home telephone conversations of Petitioner (formerly Josephine Frick), without the knowledge or consent of Petitioner, in violation of Chapter 19 of 18 U.S.C. Petitioner also alleged that she did not have a reasonable opportunity to discover either the violation or the fact that her rights under 18 U.S.C. § 2520(1)(a) had been violated until December 29, 1987, when Leslie Albin pleaded guilty to a criminal violation of 18 U.S.C. § 2511(1)(a). Petitioner admitted since the filing of her complaint that she discovered the alleged illegal wiretap on or about December 7, 1984.

Respondent filed an answer to the complaint. Respondent then filed a Motion for Judgment on the Pleadings and suggestions in support thereof, asserting that Petitioner's cause of action under 18 U.S.C. § 2520 was barred by the applicable statute of limitations. (Appendix at p. 1). The exhibits attached to the suggestions in support of the motion indicate that Petitioner discovered the wiretap on her residence telephone as early as December 10, 1984. (Appendix at pp. 27-58). These exhibits also indicate Petitioner knew that Petitioner's husband (John Frick) conducted or directed the wiretap activities, and that she was aware of a potential cause of action against him under 18 U.S.C. § 2520.

In her Suggestions in Opposition to Defendant's Motion for Judgment on the Pleadings, Petitioner argued that she was only aware that her husband or his representatives were responsible for the wiretap, but she did not know who those representatives were. (Appendix at pp. 4-11). Petitioner argued that it was only after Leslie Albin entered a plea of guilty to a criminal wiretap violation on

December 26, 1987, did she became aware of Respondent's involvement. Petitioner also argued that she had no reasonable opportunity to discover the identity of Knox prior to the entry of Albin's guilty plea. Petitioner raised no other arguments and theories in opposition to Knox's Motion for Judgment on the Pleadings at the district court level. The district court treated the Motion for Judgment on the Pleadings as one for summary judgment. The district court found that there was no potential for a cognizable issue of fact as to when Petitioner discovered the violation of § 2520. (Petitioner's Appendix at pp. 15-16). Therefore, the court determined her suit was barred by the applicable statute of limitations.

On June 23, 1989, Petitioner timely filed her notice of appeal. The United States Court of Appeals for the Eighth Circuit found that under § 2520, the cause of action accrues when the claimant has reasonable opportunity to discover the violation, not when she discovers the true identity of the violator or all the violators. Thus, Petitioner's cause of action accrued on December 7, 1984.

Petitioner raised new arguments to oppose the granting of the Motion for Judgment on the Pleadings. Her new arguments were: (1) the district court should not have applied § 2520(e) retroactively; and (2) Knox's identity was fraudulently concealed until December, 1987 and, therefore, statute of limitations tolled until Albin plead guilty. The Eighth Circuit affirmed the district court's Memorandum and Order holding that the cause of action accrued when Petitioner has a reasonable opportunity to discover the violation and not when she discovers the true identity of the violator or all the violators. The Eighth Circuit found that the statute of limitations

period began to run in 1984 because Petitioner was aware of the cause of action against Frick at that time. The Eighth Circuit refused to consider Petitioner's new arguments because they were not raised before the district court. The Eighth Circuit filed its decision on May 31, 1990. Petitioner's Motion for Rehearing En Banc was denied on July 11, 1990.

SUMMARY OF ARGUMENT

The district court properly concluded that there was no cognizable issue of fact as to when Petitioner discovered a violation of 18 U.S.C. § 2520 and therefore, her claim was barred by the applicable statute of limitations. Before the district court, Petitioner argued that a question of fact prevented the statute of limitations from running because, although Petitioner discovered the existence of the wiretap on or about December 7, 1984, she did not have any reasonable opportunity to discover Knox's involvement in the wiretapping, until Mr. Albin pled guilty on December 29, 1987. However, as the case law indicates, her cause of action under 18 U.S.C. § 2520 accrued when she discovered or, by the exercise of due diligence, could have discovered the existence of the wiretap. Therefore, the cause of action accrued on or about December 7, 1984. Under Missouri law, the simple lack of knowledge of the identity of all possible defendants does not toll the statute of limitations as to those unknown defendants. Additionally, applying Petitioner's own test for when a cause of action accrues, her claim under 18 U.S.C. § 2520 accrued in December, 1984, or, at the latest by, March, 1985.

Petitioner fails to mention to this court that on appeal to the Eighth Circuit, Petitioner raised new arguments and theories to support her contention that her complaint raised under 18 U.S.C. § 2520 is not barred by the applicable statute of limitations. These arguments were that the district court applied 18 U.S.C. § 2520(e) retroactively and that Respondent's identity was fraudulently concealed until December 29, 1987. The general rule that a reviewing court shall consider a case only on the argument and theory upon which it was tried below was followed by the Eighth Circuit. This is not a case of plain error as Petitioner contends, nor is it a decision that conflicts with other United States courts of appeals that have discussed the issue of when the statute of limitations begins for purposes of 18 U.S.C. § 2520. Respondent respectfully suggests that this Court should also follow this general rule, and because it is clear that Petitioner's cause of action accrued on or about December 7, 1984, her Petition for Writ of Certiorari should be denied.

1.

DID THE COURTS BELOW PROPERLY CONCLUDE THAT THE CAUSE OF ACTION ACCRUED AT THE TIME PETITIONER DISCOVERED THE EXISTENCE OF THE WIRETAP, REGARDLESS OF PETITIONER'S KNOWLEDGE OR LACK OF KNOWLEDGE OF RESPONDENT'S INVOLVEMENT IN SAID ALLEGEDLY ILLEGAL WIRETAP, THEREBY BARRING HER ACTION UNDER 18 U.S.C. § 2520, PURSUANT TO THE APPLICABLE STATUTE OF LIMITATIONS?

The burden of proof on a claim that a party's cause of action is barred by the statute of limitations is on the party alleging facts to avoid the running of the statute.

Scanlon v. Kansas City, 325 Mo. 125, 28 S.W.2d 84, 92 (1930) (en banc). Petitioner fails to meet that burden.

Petitioner contends that her cause of action under 18 U.S.C. § 2520 did not accrue until December 29, 1987, when Leslie Albin pled guilty to an illegal wiretap in *United States v. Albin*, Case No. 87-00283-01-CR-W-6, because that is when Petitioner learned of Knox's identity and involvement in the wiretap activity.[1] Knox disagrees. Assuming arguendo, for the purposes of deciding the issue in this Petition, that Petitioner is correct in her assertion that she did not know *all* the persons involved in the allegedly illegal wiretap, the assertion is useless to Petitioner. The timing of her discovery of the identity and involvement of *all* possible defendants is immaterial to when Petitioner's cause of action accrued. Petitioner also contends that before December 29, 1987, she did not have a reasonable opportunity, through the use of due diligence, to discover Knox's involvement and identity in said wiretapping until Albin pled guilty. Knox disagrees. Essentially, Petitioner contends that before December 29, 1987, she did not discover, or through the use of due diligence could not have discovered, the information necessary to cause the statute of limitations to begin running on her claim under § 2520. Knox disagrees. Along with making these contentions, Petitioner makes two other

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[1] This was Petitioner's only argument against Knox's Motion for Judgment on the Pleadings raised to the Honorable Howard F. Sachs in the district court. None of the other arguments raised by Petitioner in her Petition were raised and addressed by Judge Sachs. *Kriegesmann v. Berry-Wehmiller Co.*, 739 F.2d 357 (8th Cir.), *cert. denied*, 469 U.S. 1036 (1984); *Ludwig v. Marion Labs, Inc.*, 465 F.2d 114 (8th Cir. 1979).

statements that this court should find undeniably foreclose its review of this Petition.

First, Petitioner admits that on or about December 7, 1984, she discovered the allegedly illegal wiretap on her phone in her residence. (See pp. 2, 6 and 17 and Question 1 and 2 of Questions Presented of the Petition.) Second, Petitioner recognizes that the standard rule for determining when a cause of action under § 2520 accrues (when the statute of limitations begins to run) is when the Petitioner discovers or, by the exercise of due diligence, could have discovered the existence of the wiretap. Petitioner uses the phrase "basis for the cause of action" in replace of "existence of the wiretap" in an attempt to muddy the otherwise clear holdings of the case law relating to this issue, as well as the legislative intent of Congress when it passed the 1986 amendment to § 2520 adding subsection (e).

Petitioner contends that there is a conflict between the Eighth Circuit's holding in this cause and the holding in *Pavlak v. Church*, 727 F.2d 1425 (9th Cir. 1984). Petitioner suggests that there are two requirements for the statute of limitations to begin to run on Petitioner's cause of action: (1) knowledge of the existence of the wiretap; and (2) knowledge of all the parties responsible for a violation under 18 U.S.C. § 2510 *et seq*. However, a simple review of the cases discussing this issue clearly indicates that knowledge or discovery of the existence of the wiretap starts the statute of limitations running. Petitioner's discovery of the wiretap, per her own admissions, occurred on December 7, 1984 and, thus, no conflict.

Petitioner takes the "basis of the cause of action" language from the Ninth Circuit's opinion in *Pavlak v. Church*, 727 F.2d 1425, 1428 (9th Cir. 1984), to support her argument. Although the Ninth Circuit does not define what "basis of the cause of action" means, it cites as authority: *Smith v. Nixon*, 606 F.2d 1183 (D.C. Cir. 1979) (cause of action accrues when through the exercise of due diligence, plaintiff could have discovered the existence of the wiretap); and *Awbrey v. Great Atlantic and Pacific Tea Co.*, 505 F.2d 604, 609 (M.D. Ga. 1980) (cause of action accrues when plaintiff discovers that her phone calls were being intercepted); as well as, *Brown v. American Broadcasting Co.*, 704 F.2d 1296, 1304 (4th Cir. 1983) (cause of action accrues when plaintiff discovers that his communications had been intercepted). These cases make it clear that Petitioner's cause of action accrued and the limitations period began to run on or about December 7, 1984, the day she discovered the wiretap. *See also Newcomb v. Ingle*, 827 F.2d 675 (10th Cir. 1987) (there are two alternatives in deciding when a cause of action under § 2520 accrues: (1) when plaintiff discovers or, by the exercise of due diligence, could have discovered that her communications were intercepted; or (2) as soon as the interception was committed.)

Petitioner's argument that she must also have known all the parties who were responsible for the wiretap before the cause of action accrued is an erroneous statement of the law and unfounded, as evidenced by Petitioner's failure to cite even one case in support of this theory. Petitioner attempts to distinguish the Court's analysis in *Newcomb*, because Newcomb did not allege lack of knowledge of all defendant tortfeasors. However,

as established above, the lack of this particular allegation does not distinguish *Newcomb*, because knowledge of all possible defendants is immaterial to a determination of when the cause of action under § 2520 accrues.

It is clear from the pleadings filed by Petitioner during the divorce proceedings in *Frick v. Frick*, Case No. DR84-1285, she was aware of, at the very least, a cause of action under 18 U.S.C. § 2520 against her husband, John Frick, and others. (Appendix at pp. 27-58).

> Such wiretapping, *conducted by or at the direction of respondent*, was done after he moved from the residence. . . . Such conduct is clearly illegal and the fruits thereof inadmissible in evidence. *See*, 18 U.S.C.A. § 2510-2520. . . . (emphasis added)

(Appendix at pp. 47, 56). With awareness of the cause of action and knowledge of the identity of at least one of the defendants, Petitioner could easily have sued Frick pursuant to § 2520, and sought the identity of other defendants through discovery. *See Klippel v. Watkins*, 667 S.W.2d 28, 31 (Mo. Ct. App. 1984).

In *Klippel, supra*, the court found that Petitioner was aware of the cause of action for libel and knew the identity of one of the authors of the documents and could have sued and learned of the other defendants through discovery. Therefore, his cause of action as to the second defendant was time-barred. Similarly, Petitioner's cause of action as to Knox is time-barred, and the Petition for Writ of Certiorari before this court should be denied.

Petitioner's contention that she did not know, nor through the exercise of due diligence could have discovered, Knox's involvement in the allegedly illegal wiretap

until Alvin pled guilty, stands alone. She offered no affidavit(s) nor other documentation to support this claim. The deposition excerpt that she did provide to the district court and to this court simply shows that Knox followed and took pictures of Petitioner for her husband. Certainly, this bare contention, without more, fails to meet Petitioner's burden to bring forth sufficient evidence to allow a reasonable jury to find in her favor. Therefore, Respondent respectfully requests this Court deny her Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Petitioner contends that the district court's finding that she discovered the wiretap in December, 1984, and could have sued her husband and used the discovery process to learn the identities of other persons involved is in error and conflicts with *United States v. Kubrick*, 444 U.S. 111 (1979). Even looking beyond the fact that *Kubrick* is a medical malpractice case, and beyond the fact that all the cases dealing with the statute of limitations issue as it applies to 18 U.S.C. § 2520 have concluded discovery of the existence of the wiretap starts the limitation clock (as discussed above), Petitioner's own analysis applying (logically) *Kubrick* to this case manifests Respondent's assertion that Plaintiff's cause of action accrued on or about December 7, 1984.

On p. 36 of her Petition, Petitioner states that:

> In order to initiate litigation, a plaintiff must be able to plead four things: (1) an act or failure to act; (2) damage resulting from that act or failure to act (whether presumed in law or expressed); (3) that one or more specific defendants performed or failed to perform the act,

> and (4) a theory on which to base recovery against the defendant(s).

Obviously, Petitioner's phrase, "[i]n order to initiate litigation" is synonymous with the phrase, "the cause of action begins to accrue for a statute of limitation purposes." Based on Petitioner's position, clearly Petitioner admits that three of the four "things" required to be pled to initiate litigation were met on or about December 7, 1984, i.e., (1); (2); and (4). Petitioner contends only that (3) was not met until Albin plead guilty in December, 1987. A review of all the facts clearly indicates (3) was also met more than two years before Petitioner filed her complaint.

The third "thing" Petitioner states a plaintiff must know, for the statute of limitations to begin to accrue, that *one or more* specific persons performed or failed to perform the act involved. (*See* Petition at p. 36). In this case, the act involved was the wiretapping. Petitioner states on p. 39 of her Petition that she "assumed" that her husband (now ex-husband) was involved in the wiretap and then suggests that her assumption does not rise to the level of knowledge required to fit into this third element. This is her contention even though there is no knowledge requirement within her four "things" needed to be plead. Additionally, a review of the Petitioner's pleadings filed in *Frick v. Frick*, Case No. DR84-1285, and her suggestions in opposition to Defendant's Motion for Judgment on the Pleadings filed in this case at the district court level, clearly indicate Petitioner knew that her husband and his attorneys, and others, were somehow involved in the wiretapping of her phone.

On the seventh page of Petitioner's Memorandum of Petitioner's Report on Status of Discovery Issues Post Meeting of Counsel, she stated:

> Petitioner has located a potentially illegal wire tap in the home and her attorneys have seen and had read to them by respondent's attorneys certain transcripts of petitioner's private telephone conversations with persons other than respondent.

(Appendix at p. 34). This pleading was filed on or about December 10, 1984.

On the second page of Petitioner's Motion for Protective Order in Paragraph 2, Petitioner argued that she should be protected from further discovery until wiretapped conversations were made available to her and her attorneys. (Appendix at p. 37). This pleading was filed on or about February 14, 1985.

On the second page of Petitioner's Suggestions in Support of Motion for Protective Order, Petitioner stated:

> Respondent's attorneys have indicated they have tapes and transcriptions of telephone conversations between petitioner and persons other than respondent. They have also stated that these were obtained as a result of wiretap respondent or his agents established on petitioner's telephone line in her home.

(Appendix at p. 41). This pleading was filed on or about February 14, 1985.

On the first page of Petitioner's Motion to Quash Subpoena and for Protective Order from Deposition, Petitioner states that her husband "is in possession of illegally made tape recordings of wiretapped conversations

of petitioner." (Appendix at p. 43). This pleading was filed on or about February 14, 1985.

On the first page of Petitioner's Suggestions in Support of Motion to Quash Subpoena and for Protective Order from Deposition, Petitioner accuses her husband "and his attorneys" with possessing recordings and transcriptions of wiretapped conversations, and that the wiretapping was "conducted by or at the direction of respondent." (Appendix at p. 47). This pleading was filed on or about February 14, 1985.

On the second page of Petitioner's Motion for Protective Order from Deposition, Andes stated:

> Petitioner is informed and believes that respondent or his representatives are in possession of illegally made tape recordings of wiretapped conversations of petitioner.

(Appendix at p. 52). This pleading was filed on or about March 26, 1985.

On the second page of Petitioner's Suggestions in Support of Petitioner's Motion for Protective Order, Petitioner stated that her husband and his attorneys "possess recordings and transcriptions of wiretapped communications between petitioner and persons other than respondent," and that said wiretapping was "conducted by or at the direction of respondent." (Appendix at p. 56). This pleading was filed on or about March 26, 1985.

Additionally, in Petitioner's Suggestions in Opposition to Defendant's Motion for Judgment on the Pleadings, Petitioner stated:

> Until the date of December 26, 1987, Plaintiff, Josephine Andes, was only aware that her

> husband, John W. Frick, or his representatives, had legally installed an electronic wiretapping device on her telephone line, but did not know who John W. Frick's representatives were.

(Appendix at p. 9). This pleading was filed before the district court on April 11, 1989.

Even under Plaintiff's application of *Kubrick* to this case, there is no question but that as of December 7, 1984, or at the very latest, March 26, 1985, Petitioner knew "that one or more specific defendants performed or failed to perform the act", as required by the third element of Petitioner's own analysis. It is clear from the pleadings Petitioner filed during her divorce action, and before the district court in this action, that she discovered the wiretap and knew that her husband, his attorneys, and others, were involved in the wiretapping activities. Petitioner's own analysis does not require that Petitioner know each and every defendant that may have been involved in the act performed to start the statute of limitations to accrue. As the district court properly held and the Eighth Circuit properly affirmed, Petitioner discovered the wiretap and knew that at least her husband was involved. Therefore, this Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

2.

CAN ARGUMENTS AND THEORIES RAISED BY PETITIONER THAT WERE NOT BEFORE THE DISTRICT COURT BE CONSIDERED FOR THE FIRST TIME ON APPEAL?

It is a well established general rule that a reviewing court will not consider arguments and theories not

properly presented or raised in the district court. *Kriegesmann v. Berry-Wehmiller Co.*, 739 F.2d 357, 358 (8th Cir. 1984); *Kapp v. Naturelle, Inc.*, 611 F.2d 703, 709 (8th Cir. 1979).

In *Kriegesmann, supra,* the plaintiff sued for age discrimination under the Age Discrimination and Employment Act. Defendant filed a motion for summary judgment asserting that plaintiff's action was untimely. *Id.* Before the district court, plaintiff argued that the time for filing did not begin to run until the severance benefits ended, as the employer's actions constituted a continuing violation. *Id.* at 358. The district court granted the motion for summary judgment. On appeal, the plaintiff alleged, for the first time, that the employer's failure to post a notice of his rights under the Age Discrimination in Employment Act, violated the Act and, therefore, the filing period was equitably tolled. The Eighth Circuit did not consider that argument because it was a theory not presented to the district court. *Id.* This court denied Kriegesmann's Petition for Writ of Certiorari. *Kriegesmann v. Berry-Wehmiller Co.*, 469 U.S. 1036 (1984).

In *Kapp v. Naturelle, Inc.*, Kapp filed an adversary proceeding claiming that disallowance of creditors' claims against him individually was required because the debts were corporate debts. 611 F.2d 703 (8th Cir. 1979). The bankruptcy court agreed and the district court affirmed. On appeal to the Eighth Circuit, in defense of his position, Kapp argued, *inter alia,* that the default judgments obtained against Kapp prior to the filing of the bankruptcy proceeding were fraudulently obtained. *Id.* at 708-09. This court noted that fraud was not pled or considered by the bankruptcy court. *Id.* at 709. Arguments

and theories not raised in the proceedings below are not considered by appellate courts when raised for the first time on appeal. *Id.* at 709. *See also St. Louis Developmental Disabilities Treatment Center Parents' Association v. Mallory*, 767 F.2d 518 (8th Cir. 1985); *Korgel v. United States*, 619 F.2d 16, 18 (8th Cir. 1980); *United States v. Frank*, 587 F.2d 924, 928 (8th Cir. 1978); *Ludwig v. Marion Labs, Inc.*, 465 F.2d 114, 117 (8th Cir. 1972).

As in each of these cases, Petitioner presented, for the first time on appeal, arguments and theories not raised in the proceedings to the trial court. As pointed out in the Counterstatement of the Case, Petitioner argued, in the proceedings below, that the statute of limitations did not begin to run simply because she did not know of Respondent's identity or involvement in the alleged illegal wiretap until Mr. Albin pled guilty to a criminal violation of 18 U.S.C. § 2510 *et seq.* on December 29, 1987. On appeal to the Eighth Circuit, Petitioner raised additional arguments and theories in an attempt to obtain a reversal of the trial court's finding that Petitioner's claim was barred by the applicable statute of limitations. Petitioner's arguments and theories that 18 U.S.C. § 2520(e) should not be applied retroactively and that Knox's identity and involvement was fraudulently concealed, thereby tolling any statute of limitations, were arguments and theories raised for the first time on appeal and the Eighth Circuit declined to consider them. As in *Kriegesmann*, Petitioner's request for Writ of Certiorari should be denied.

Additionally, Petitioner raises a new argument to this court. Petitioner now contends that a retroactive application of 18 U.S.C. § 2520(e) denies Petitioner her constitutional rights of due process, specifically, the "taking

clause" of the Fifth Amendment. Once again, an argument not raised below, and one not supported within her Petition.

Though the Supreme Court does not normally decide issues not presented below, it is not precluded from doing so. *Carlson v. Green*, 446 U.S. 14 (1980). It is within the discretion of the appellate courts to determine, on a case by case basis, what questions may be taken up and resolved for the first time on appeal. *Singleton v. Wolf*, 428 U.S. 150 (1976). The court may review arguments or theories for first time on appeal where the proper resolution is beyond any doubt, or where injustice might otherwise result. *Id.* at 121; *United States v. Adkinson*, 297 U.S. 391, 392 (1936).

The Eighth Circuit's refusal to consider an argument not heard below does not work substantial injustice upon the Petitioner. Petitioner suggests that she may suffer substantial injustice should this petition not be granted simply because she could not then pursue her claim for relief under § 2520, the civil remedy for a criminal violation of § 2511.[2] However, if substantial injustice was suffered every time a plaintiff was prevented from pursuing a claim, this Court would be granting petitions for writ of certiorari with each blink of an eye!

In an effort to provide the court with a valid reason for reviewing this case, Petitioner suggests a "plain error" review is appropriate under Fed. R. Civ. P. 51. However,

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[2] This Court should also be aware that Respondent was indicted for violating Chapter 19 under 18 U.S.C. § 2511 and was acquitted on all counts.

Rule 51 deals with jury instructions and their objections. Rule 51 is not applicable to this case in that there are no jury instructions at issue. The Petitioner's appeal to the Eighth Circuit came as a result of the district court's granting of Respondent's Motion for Judgment on the Pleadings. Therefore, Petitioner's request for a Rule 51 "plain error" review is without merit.

Petitioner also asserts that plain error review is appropriate under Supreme Court Rule 24.1(a). The interests of justice and efficient judicial administration dictate against the exercise of this power. Petitioner alleges plain error in the district court's arguably retroactive application of § 2520(e) to her claim which accrued December 7, 1984. However, Petitioner did not challenge an alleged retroactive application of the statute at the district court level. Thus, the only issue decided by the district court was the date Petitioner's claim actually accrued. The district court properly determined that Petitioner's claim accrued more than two years prior to the bringing of the suit. The failure of Petitioner to raise the retroactivity argument precluded the trial court from an opportunity to adjudicate it on the merits. Therefore, Petitioner effectively waived this argument. Clearly, the Eighth Circuit acted within its discretion in refusing to consider the retroactivity argument. The court did not find plain error in the district court's decision, and cannot be said to have committed plain error in refusing to consider the retroactivity argument since Petitioner failed to assert it before the district court. *See Kriegesmann, supra.*

A. Should this court choose to review Petitioner's argument, raised for the first time on appeal, that 18 U.S.C. § 2520(e) should not be applied retroactively, her claim for violation of 18 U.S.C. § 2520 is still barred by the most appropriate or most analogous, the applicable statute of limitations.

It is well established that as the reviewing court, this court may affirm the lower court's order on any ground supported by the record, even if the issue was not pleaded, tried, or otherwise referred to in the proceedings below. *Brown v. St. Louis Police Department*, 691 F.2d 393, 396 (8th Cir. 1982); *McClain v. Kitchen*, 659 F.2d 870, 873 (8th Cir. 1981).

In his Memorandum and Order, Judge Sachs concluded that Petitioner's suit under 18 U.S.C. § 2520 was barred by the *applicable* statute of limitations because there was "no potential for a cognizable issue of fact as to when plaintiff discovered a violation of sec. 2520." (Petitioner's Appendix at pp. 15-16). By her own admissions, discovery of the existence of the wiretap occurred on or about December 7, 1984. (Petition in Questions Presented 1 and 2; pp. 1, 6 and 17). Petitioner argues, for the first time on appeal, that § 2520(e), the limitation provision, cannot be applied retroactively, yet her Petition provides this court no guidance as to an appropriate alternative. Respondent proffers 47 U.S.C. § 415(b) and Mo. Ann. Stat. § 516.140 as appropriate alternatives.

In *Newcomb*, the Tenth Circuit concluded that it shall apply the most appropriate or most analogous state statute of limitations to the most analogous state private cause of action to a claim under § 2520. 827 F.2d at 677-78

(*citing as authority Board of Regents v. Tomanio*, 446 U.S. 478, 488 (1980)). The court held that a cause of action for invasion of privacy was the most analogous state private cause of action to a claim under § 2520 because, "the protection of privacy was an overriding congressional concern in enacting 18 U.S.C. § 2510-2520." *Id.* at 678. The court applied Kansas' 2-year statute of limitations because the Kansas Supreme Court had already held that this statute of limitations applied to invasion of privacy actions. *Id.* at 677, fn.3. Neither the Missouri Supreme Court nor any Missouri intermediate appellate courts have determined which statute of limitations applies to a cause of action under § 2520 or invasion of privacy.

In *Tomanio*, this Court held that where there is no specifically stated or otherwise applicable relevant federal statute of limitations for a federal substantive claim enacted by Congress, federal courts must apply the most appropriate or most analogous statute of limitations provided by the state law. 446 U.S. 478, 488 (1980). *See also Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

In *Pavlak*, the Ninth Circuit held that the 2-year statute of limitations under 47 U.S.C. § 415(b) barred Pavlak's cause of action under not only 47 U.S.C. § 207 and 605, but also 42 U.S.C. § 1983 and 18 U.S.C. § 2520, unless Pavlak could prove fraudulent concealment. 727 F.2d at 1427-29. Pavlak argued that even if 47 U.S.C. § 415(b) barred her claims under the Federal Communications Act, it could not be applied to her other civil rights claims (i.e., 42 U.S.C. § 1983 and 18 U.S.C. § 2520). *Id.* at 1427. The Court of Appeals disagreed. The Ninth Circuit cited *Johnson*, 421 U.S. 454 (1975), noting that since, in *Johnson*,

there was "no specifically stated *or otherwise relevant federal statute of limitations* for a cause of action under § 1981, the controlling period would *ordinarily* be the most appropriate one provided by state law." *Id.* at 1427. However, for its case, § 415(b) specifically addressed the alleged violation of Pavlak's rights (wiretap of the telephone of her residence). *Id.*

> Where a federal statute of limitations is directly applicable to the facts, is the most analogous statute of limitations, and provides a reasonable opportunity to present civil rights claims, it is the proper statute of limitations to be applied.

Id. at 1427-28. The court concluded that "[a]pplying § 415(b) does not bar, defeat, or inhibit the *timely* assertion of civil rights claims" under 42 U.S.C. § 1983 or 18 U.S.C. § 2520. *Id.* at 1428. Applying § 415(b) to Petitioner's claim under 18 U.S.C. § 2520 as the applicable statute of limitations would not bar, defeat or inhibit the *timely* assertion of her claim. Therefore, as stated above, since her cause of action arose on or about December 7, 1984, she had until on or about December 7, 1986, to file her lawsuit. Petitioner's cause of action was properly dismissed by the district court and affirmed by the Eighth Circuit.

Knox asserts that applying the most appropriate or most analogous state statute brings the court to the same conclusion, Petitioner's cause of action under § 2520 is time barred because, the most appropriate or most analogous state statute is the 2-year statute of limitation under Mo. Ann. Stat. § 516.140. This statute of limitations limits the bringing of a cause of action for intentional and quasi-intentional torts (e.g., assault, battery, libel,

slander) to two years from the date the cause of action accrued. However, the question in this case, should this court choose to even consider this argument raised only on appeal, is: what is the most appropriate or most analogous state statute of limitations to apply to a § 2520 claim, or according to *Newcomb*, an invasion of privacy claim?

In *Barber v. Time, Inc.*, the defendant published an article about a physical ailment of plaintiff and printed her picture. 159 S.W.2d 291 (Mo. 1942). Petitioner sued based on a violation of her right to privacy. *Id.* The Supreme Court discussed the right to privacy, recognized an individual's rights to such, concluded that such an article of news could involve both libel and an invasion of privacy, and the action could be stated in separate counts. *Id.* at 296. The court noted that recovery could be had on the libel count if the statements made were untrue, while recovery for true statements would be limited to the invasion of a privacy count. *Id.*

Knox asserts that *Barber* and more recent cases in Missouri discussing a cause of action for invasion of privacy, although finding invasion of privacy a separate cause of action from libel, continue to compare these two causes of action, thereby evidencing that, in Missouri, a cause of action for invasion of privacy is most analogous to a cause of action for libel.

The Ninth Circuit has held that California's one year statute of limitation governing defamation actions also applies to actions for invasion of privacy. *Fleury v. Harper & Row, Publishers, Inc.*, 698 F.2d 1022, 1027 (9th Cir. 1983). In *Fleury*, the plaintiffs filed suit against the publisher for

invasion of privacy, libel, intentional infliction of emotional distress and injunctive relief. *Id.* The district court granted defendant's motion for summary judgment based on the applicable state statute of limitations, dismissing the entire action and the Court of Appeals affirmed.[3]

The district court in *Smith v. Esquire, Inc.*, held Maryland's one-year statute of limitations governing libel and slander applicable to an invasion of privacy action based on a false light theory. 494 F.Supp. 967, 970 (D. Md. 1980). The court noted that although Maryland appellate courts had not addressed this issue, it felt that the Maryland court would find the libel statute of limitations applicable, given the similarity between the libel claim and the invasion of privacy claim based on false light theory. *Id.* "To hold otherwise would severely undercut the policy considerations which led to the enactment of the one-year statute governing defamation cases." *Id.*

The holdings in *Fleury* and *Smith* support the logical conclusion that an action for invasion of privacy is most analogous to an action for libel. Therefore, if this Court chooses to apply a state statute of limitations in its determination of this Petition for Writ of Certiorari, it should apply the 2-year statute of limitations under Mo. Ann. Stat. § 516.140. As additional support for this court applying § 516.140 to this alleged violation of Chapter 19 of 18

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[3] In *Fleury*, plaintiffs also attempted to argue on appeal that the one year statute of limitations denied them due process of law. However, the Ninth Circuit refused to consider the argument because it was not made in the district court, nor in Plaintiffs' Motion to Alter or Amend the Judgment. 698 F.2d at 1027.

U.S.C., Chapter 19 requires the defendant to: *intentionally* intercept wire, oral, or electronic communication (18 U.S.C. § 2511(1)(a)); *intentionally* use electronic, mechanical, or other device to intercept any oral communication (18 U.S.C. § 2511(1)(b)); *intentionally* disclose contents of any wire, oral, or electronic communication (18 U.S.C. 2511(1)(c)); or *intentionally* use of any wire oral communication (18 U.S.C. § 2511(1)(d)).

Knox asserts that to recover under § 2520, Petitioner must essentially present proof of a tort, invasion of privacy, *intentionally* committed, in other words, present proof that an intentional tort was committed. Therefore, pursuant to the Missouri 2-year statute of limitations relating to intentional torts, Mo. Ann. Stat. § 516.140, Petitioner's claim under § 2520 is barred by the most appropriate or most analogous state statute of limitations. As Judge Sachs concluded, Petitioner's claim is barred by the applicable statute of limitations. (Petitioner's Appendix at p. 16).

CONCLUSION

Petitioner discovered the existence of the wiretap on December 7, 1984. Before the district court, Petitioner argued solely that because she did not know of Respondent's involvement in the wiretapping of her house until Albin pled guilty in December of 1987. Both the United States District Court for the Western District of Missouri and the United States Court of Appeals for the Eighth Circuit held that such lack of knowledge does not toll the statute of limitations and her cause of action is barred by

the applicable statute of limitations. Contrary to what Petitioner suggests, there is no direct conflict between this decision of the Eighth Circuit and the decision of this Court in *Sohn v. Waterson*, 84 U.S. 596 (1873). A reviewing court shall not consider arguments and theories not properly presented or raised in the district court. Therefore, Petitioner's argument of retroactivity should not be addressed by this Court. Regardless, the courts below properly concluded that Petitioner's claim was barred by an applicable statute of limitations.

There is no conflict between the decision of the Eighth Circuit in this cause and the Ninth Circuit's decision in *Pavlak*, relating to when the cause of action under 18 U.S.C. § 2520 accrues. All cases discussing when the statute of limitations period begins to accrue for purposes of a civil action pursuant to 18 U.S.C. § 2520 have concluded that the period begins when the plaintiff discovers, or should have discovered the existence of the wiretap. In this case, when Petitioner discovered the existence of the wiretap is undisputed. Additionally, even utilizing the "critical facts" analysis discussed by Petitioner, it is clear that all of such "critical facts" were clear to Petitioner on December 7, 1984, or at the very latest, by the end of March, 1985. Her claim was untimely and properly dismissed. Therefore, her Petition for Writ of Certiorari should be denied.

As noted in Supreme Court Rule 10, "review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore." As discussed in this Brief in Opposition, there are no special nor important reasons for this Court

to grant this Petition. There are no conflicts between decisions of the United States courts of appeals as Petitioner suggests.

WHEREFORE, for the foregoing reasons, Respondent respectfully prays this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit filed by Josephine A. Andes, grant Respondent double costs under Supreme Court Rule 43.7, and for any and all other relief this Court deems just and proper.

Respectfully submitted,

JAMES R. WYRSCH
Counsel of Record
MICHAEL P. JOYCE
KOENIGSDORF & WYRSCH, P.C.
Tenth Floor
1006 Grand Avenue
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Attorneys for Respondent

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JOSEPHINE A. ANDES, Plaintiff,	)	Case No. 88-1152-CV-W-6
v.	)	
LESLIE E. ALBIN, and THEODORE R. KNOX, Defendants.	)	

MOTION FOR JUDGMENT ON THE PLEADINGS

COMES NOW, individual Defendant Theodore R. Knox, by and through counsel, and moves this Honorable Court for a Judgment on the Pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

Attached hereto and incorporated herein by reference are Suggestions in support of Defendant Knox's Motion for Judgment on the Pleadings.

WHEREFORE, based upon the foregoing, Defendant Knox herein prays for an order of this Court granting his motion for Judgment on the Pleadings and any and all other relief this Court deems just and proper.

Respectfully submitted,

KOENIGSDORF & WYRSCH, P.C.

By: /s/ Michael P. Joyce
JAMES R. WYRSCH #20730
MICHAEL P. JOYCE #38501
1006 Grant Avenue
10th Floor
Kansas City, Missouri 64106
(816) 221-0080
ATTORNEYS FOR DEFENDANT KNOX

I hereby certify that a copy of the foregoing was mailed, this 30th day of March, 1989, to:

Mr. William H. Pickett
William H. Pickett, P.C.
Interstate Building
Fourth Floor
417 East 13th Street
Kansas City, Missouri 64106

/s/ Michael P. Joyce

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JOSEPHINE A. ANDES, Plaintiff,	)	Case No. 88-1152-CV-W-6
v.	)	
LESLIE E. ALBIN, and THEODORE R. KNOX, Defendants.	)	

SUGGESTIONS IN SUPPORT OF
MOTION FOR JUDGMENT ON THE PLEADINGS

COMES NOW, Defendant Knox, and in support of his Motion for Judgment on the Pleadings, states as follows:

Background

In her Complaint for Damages, Plaintiff alleges that between April, 1984, and December, 1984, Defendant Knox intercepted, disclosed or intentionally used the home telephone conversations of Plaintiff (formerly Josephine Frick), without the knowledge or consent of Plaintiff, in violation of Chapter 119 of 18 U.S.C. Plaintiff also alleges that Plaintiff did not have reasonable opportunity to discover either the violation or the fact that her rights under 18 U.S.C. § 2511(1)(a) had been violated until December 29, 1987, when Leslie Albin pleaded guilty to criminal violation of 18 U.S.C. §2511(1)(a).

Discussion

18 U.S.C. §2520 provides for the recovery of civil damages for the violation of 18 U.S.C. §2510, *et seq.* 18 U.S.C. §2520(e) provides that:

> A civil action brought under this section may not be commenced later than 2 years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

Plaintiff commenced her civil action on November 22, 1988, therefore, for Plaintiff to survive a statute of limitation defense, she must show she did not have a reasonable opportunity to discover the violation prior to November 22, 1986.

Although pleadings are generally inadmissable in evidence in the same trial, such is not true of abandoned pleadings or pleadings in another lawsuit. *Manahan v. Watson,* 655 S.W.2d 807, 809 (Mo. App. 1983); *Littell v. Bi-State Transit Development Agency,* 423 S.W.2d 34 (Mo. App. 1967). A pleading filed by a party in a cause which states facts relevant to issues in another cause on trial, in which the party filing the pleading is a party, is admissible against the party making it as an admission. *Ross v. Philip Morris & Co.,* 328 F.2d 3, 14-15 (8th Cir. 1964); *Simmons v. Kansas City Jockey Club,* 66 S.W.3d 119 (Mo. 1933).

In the prior civil proceeding, *In re the Marriage of Josephine Antionette Frick v. John William Frick,* Case No. DR84-1285, in the Circuit Court of Jackson County, Missouri, the Petitioner, Josephine Frick (now Josephine Andes, Plaintiff in this matter), filed a number of pleadings that indicate that Plaintiff and her attorneys had, in fact, discovered the alleged violation or the fact that her

rights had been violated under 18 U.S.C. §2511(1)(a) well before November 22, 1986.

As early as December 10, 1984, in Plaintiff's Memorandum of Petitioner Reporting the Status of Discovery Issues Post Meeting of Counsel (attached hereto and incorporated by reference as Exhibit A), Plaintiff discovered the alleged violation.

> Petitioner has located a potentially illegal wiretap in the home and her attorneys have seen and had read to them by respondent's attorneys certain transcripts of petitioner's private telephone conversations with persons other than respondent. (See Exhibit A, Page 7.)

On February 14, 1984, Plaintiff through her attorneys, filed a Motion for Protective Order, Suggestions in Support of said Motion, as well as, a Motion to Quash Subpoena and for a Protective Order from Deposition, and Suggestions in Support of said Motion to Quash. (See Exhibits B-E, attached hereto and incorporated by reference). In the Suggestions in Support of the Motion for Protective Order, Plaintiff stated that Mr. Frick's attorneys indicated that they had tapes and transcriptions of telephone conversations between Plaintiff and persons other than Mr. Frick. Also,

> [s]uch wiretapping and taping is clearly illegal and the making and dissemination of same is prohibited under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §2510-2520. . . . (See Exhibit C, Page 2.)

Again, in Plaintiff's Suggestions in Support of Mrs. Frick's Motion to Quash, she states that the wiretapping conducted by Mr. Frick or at his direction, is "clearly

illegal" and cites 18 U.S.C. §2510-2520. (See Exhibit E, Page 1.)

On March 26, 1985, Plaintiff, through her attorneys, filed a Motion for Protective Order from Depositions and Suggestions in Support thereof. (See Exhibits F and G, attached hereto and incorporated by reference.)

> Petitioner is informed and believes that respondent or his representatives are in possession of illegally made tape recordings of wiretapped conversations of petitioner. (See Exhibit F, Page 2.)

In the Suggestions in Support, Mrs. Frick indicates her knowledge of the wiretapping and states that such activity is "clearly illegal" citing 18 U.S.C.A. §2510-2520. (See Exhibit G, Page 2.) In addition, the recordings and transcriptions from the tapes were requested by Plaintiff in the divorce case, in her First Request for Production of Documents, filed on September 7, 1984. (See Exhibit G, Page 3.)

WHEREFORE, for the foregoing reasons, Defendant Knox respectfully moves this Court to grant his Motion for Judgment on the Pleadings and any and all other relief this Court deems just and proper.

Respectfully submitted,

KOENIGSDORF & WYRSCH, P.C.

By: /s/ Michael P. Joyce
JAMES R. WYRSCH #20730
MICHAEL P. JOYCE #38501
1006 Grand Avenue
10th Floor
Kansas City, Missouri 64106
(816) 221-0080
ATTORNEYS FOR DEFENDANT KNOX

I hereby certify that a copy of the foregoing was mailed, this 30th day of March, 1989, to:

Mr. William H. Pickett
William H. Pickett, P.C.
Interstate Building
Fourth Floor
417 East 13th Street
Kansas City, Missouri 64106
/s/ Michael P. Joyce

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JOSEPHINE A. ANDES,	)	
	)	
Plaintiff,	)	Case No.
v.	)	88-1152-CV-W-6
	)	
LESLIE E. ALBIN, et al.,	)	
	)	
Defendants.	)	

PLAINTIFF'S SUGGESTIONS IN OPPOSITION TO
DEFENDANT'S MOTION FOR JUDGMENT
ON THE PLEADINGS

COMES NOW the plaintiff herein, and respectfully submits the following Suggestions in Opposition to Defendant Theodore R. Knox's Motion for Judgment on the Pleading.

Background

This case arises out of illegal wiretapping activities performed by the defendants of the plaintiff's telephone line leading to and in her home located at 1724 North 11th Street, Blue Springs, Missouri, during the time period beginning sometime in April 1984, through and including December 1984, while plaintiff Josephine A. Andes was involved in a divorce proceeding. During that period of time, defendants Leslie E. Albin and Theodore R. Knox installed electronic wiretapping devices upon the telephone lines leading to and inside the residence of plaintiff Josephine A. Andes, and thereafter made electronic recordings of private telephone conversations of

plaintiff with third persons. Plaintiff discovered the illegal wiretapping on or about December 7, 1984.

Argument

At the time of discovery, plaintiff believed her husband, John W. Frick, to be the only person responsible for the electronic wiretapping devices to be installed on her telephone lines.

Prior to the date of December 26, 1987, plaintiff Josephine A. Andes had no knowledge of the identity of defendants Leslie E. Albin and Theodore R. Knox or of their participation in the installation of said electronic wiretapping devices. Plaintiff's knowledge of the defendants' participation came only after defendant Leslie E. Albin entered a plea of guilty in the case styled *United States of America v. Leslie E. Albin*, cause number 87-00283-01-CR-W-6. Until the date of December 26, 1987, plaintiff Josephine A. Andes was only aware that her husband, John W. Frick, or his representatives, had illegally installed an electronic wiretapping device on her telephone line, but did not know who John W. Frick's "representatives" were. Only after the plea entered by defendant Leslie E. Albin in the above-mentioned criminal action did plaintiff become aware of the identity of the defendants in the instant action.

Therefore, plaintiff did not have a reasonable opportunity to discover the violation committed by defendants Leslie E. Albin and Theodore R. Knox until after the date upon which defendant Albin entered his plea of guilty in the criminal case against him.

Clearly, plaintiff is within the statute of limitations to bring this action against defendants Leslie E. Albin and Theodore R. Knox, and discovery should go forward to determine if she had any knowledge of defendants Leslie E. Albin and Theodore R. Knox prior to defendant Leslie E. Albin's plea of guilty in the criminal case before defendant's Motion for Judgment on the Pleadings should be granted.

It is plaintiff's position that the question of when she had actual knowledge of defendants Leslie E. Albin and Theodore R. Knox' participation in the installation of the electronic wiretapping device on the telephone line leading to and in her residence is a factual issue and should not be resolved by the Court as a question of law. As shown in *E. D. Systems v. Southwestern Bell Tel.*, 674 F.2d 453 (5th Cir. 1982), the court held unless there is no room for ordinary minds to differ as to the proper conclusions to be drawn from the evidence, the issue of notice is factual and should not be resolved by the court. The facts in the instant case clearly show that the plaintiff had no reasonable opportunity to discover the identity of defendants Leslie E. Albin and Theodore R. Knox prior to defendant Albin's plea of guilty in the criminal case against him, and therefore no knowledge of the violation of §18 U.S.C. 2510 by defendants Leslie E. Albin and Theodore R. Knox.

Even as shown in the various attachments to defendant's Suggestions in Support of Motion for Judgment on the Pleadings, nowhere are there any references to defendants Leslie E. Albin and/or Theodore R. Knox, nor do the attachments name defendants Albin or Knox as the representatives of John W. Frick.

In fact, as can be seen from the attached Exhibits "C", "D", and "E", that are from the deposition of John William Frick taken June 4, 1984, which was a typographical error and should read as June 4, 1985, and continued on the date of June 20, 1985, (Exhibits "A" and "B" hereto), it is clear, on page 85 of the deposition attached hereto, Mr. Frick affirmatively, under oath, stated that he only employed Ted Knox to take photographs, not to do anything else. The plaintiff specifically was told under oath by her husband at that time what Ted Knox representation was and it did not include wiretapping.

Likewise, the plaintiff testified in her deposition taken on the date of August 30, 1985, and as shown in the attached Exhibits "F", "G", "H" and "I" the extent of plaintiff's knowledge and information of the wiretapping on the telphone line leading to and in her in her home.

WHEREFORE, in light of the above and foregoing, plaintiff respectfully suggests this Honorable Court deny defendant's Motion for Judgment on the Pleadings.

Respectfully submitted,

/s/ WHP

William H. Pickett #21324
WILLIAM H. PICKETT, P.C.
417 East 13th Street
Kansas City, Missouri 64106
816/221-4343

ATTORNEY FOR PLAINTIFF

I hereby certify that a copy of
the above and foregoing was
mailed, postage, prepaid, this
11th day of April, 1989, to:

James R. Wyrsch, Esq.
Michael P. Joyce, Esq.
KOENIGSDORF & WYRSCH, P.C.
1006 Grand Avenue
10th Floor
Kansas City, Missouri 64106

/s/ WHP
Attorney for Plaintiff

EXHIBIT "A"

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

In Re The Marriage Of	)	
JOSEPHINE ANTOINETTE FRICK,	)	
Petitioner,	)	No. DR84-1285
and	)	
JOHN WILLIAM FRICK,	)	
Respondent.	)	

DEPOSITION OF JOHN WILLIAM FRICK,

produced, sworn and examined on Tuesday, the 4th day of June, 1984, between the hours of 8 o'clock in the forenoon and 6 o'clock in the afternoon of that day, pursuant to notice, at the law offices of Thayer, Bernstein & Bass, 9200 Ward Parkway, Kansas City, Jackson County, Missouri, before

THERESA M. TAYLOR
Certified Shorthand Reporter

a Notary Public in and for the State of Missouri, in a certain cause as set out above; taken on the part of the Petitioner.

APPEARANCES:

The Commissioner:	Ms. Laura A. Cochet Suite 206-8800 Blue Ridge Blvd. Kansas City, Missouri 64138
For the Petitioner:	Ms. Charlotte P. Thayer Thayer, Bernstein & Bass Suite 175 – 9200 Ward Parkway Kansas City, Missouri 64114
For the Respondent:	Ms. Rose Anne Nespica 219 North 7-Highway Blue Springs, Missouri 64015
	For: Dorothy C. Parker 8609 East 78th Terrace Kansas City, Mo. 64138

EXHIBIT "B"

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

In Re The Marriage Of	)	
JOSEPHINE ANTOINETTE FRICK,	)	
Petitioner,	)	No. DR 84-1285
and	)	
JOHN WILLIAM FRICK,	)	
Respondent.	)	

DEPOSITION OF JOHN WILLIAM FRICK,
(continued)

produced, sworn and examined on June 20, 1985, between the hours of 8 a.m. and 6 p.m. of that day, at the law offices of Thayer, Bernstein & Bass, Suite 175, 9200 Ward Parkway, Kansas City, Jackson County, Missouri, before:

Dorothy C. Parker
Certified Shorthand Reporter

a notary public in and for the State of Missouri, in the enue and style set out above; taken on behalf of the Petitioner.

APPEARANCES

THE COMMISIONER:	MS. LAURA A. COCHET 8800 Blue Ridge Blvd. – Suite 206 Kansas City, Missouri 64138
For the Petitioner:	MS. CHARLOTTE P. THAYER Thayer, Bernstein & Bass 9200 Ward Parkway – Suite 175 Kansas City, Missouri 64114
For the Respondent:	MS. ROSE ANNE NESPICA 219 North 7 Highway Blue Springs, Missouri 64015 and MR. MICHAEL ALBANO Paden, Welch, Martin, Albano & Graeff 311 West Kansas Independence, Missouri 64050
Also Present:	Josephine A. Frick, Petitioner

EXHIBIT "C"

* * *

(p. 85) A. She has been seen dating Bob McDaniels.

Q. What do you mean she's been seen dating him? Explain that to me.

A. Someone followed her. They went to a restaurant and went to a movie.

Q. Who followed her?

A. Ted Knox.

Q. Who is Ted Knox?

A. He's a private investigator.

Q. Someone you employed to follow her?

A. Yes.

Q. When did you first employee him to follow Jo Ann?

A. Right after we separated.

Q. And how recently has he followed her?

A. That was basically it. I found out, you know, what I wanted to know as far as whether or not I could make the relationship – whether she was being honest with me. And I basically knew before that. But I guess you just want to know for sure.

Q. How much money have you paid Ted Knox?

A. I don't remember. It was probably about – I don't remember. $300 or $400.

Q. Did you employ Ted Knox to do anything other than follow Jo Ann?

A. No. Oh, he took some pictures.

EXHIBIT "D"

(p. 86) Q. When did he take pictures?

A. The day he followed her.

Q. The day? He followed her only one day?

A. I really don't know how often he followed her. But I know, you know, he told me about Bob McDaniels, and he took pictures on that day.

Q. Pictures of Jo Ann going out to dinner and going to a show?

A. Yes. And it was like a week after we were separated or very shortly thereafter.

Q. And you think that's evidence she was having an affair with Bob McDaniels?

A. Well, as I said when you said had she had relationships, I said, "I don't know how far you want to go."

Q. Do you consider that that she was having an affair with Bob McDaniels?

A. No. I'd say that was a date.

Q. All right. Did Ted Knox take pictures of Jo Ann with anyone else?

A. No. Not that I know of.

Q. Did he follow her when she was involved in any activities with anyone else?

A. Not to my knowledge.

Q. Did a person named DeMoe, under either the

EXHIBIT "E"

(p. 87) direction of Ted Knox or directly for you, follow or otherwise attempt to obtain information on Jo Ann's activities?

A. He didn't do anything under my direction, nobody by that name.

Q. You know who this man is; do you not?

A. I know who DeMoe is.

Q. Does Ted Knox have an occupation, other than as a detective, private detective?

A. I don't know.

Q. You don't know whether he is employed by a police department?

A. No.

MS. THAYER: I'd like to take a break for a few minutes.

(A recess was taken.)

Q. (By Ms. Thayer) Mr. Frick, did you ever cause any wiretapping devices to be established in the home at 1724 North 11th Street Court?

A. I wish to invoke the Fifth Amendment privilege against self-incrimination, and I decline to answer that question on the grounds that it might tend to incriminate me.

MS. THAYER: If the Court please, I object to that. If one is going to invoke the

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IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

JOANN FRICK,	)	
Plaintiff,	)	
vs.	)	No. CV85-013050
CLAUDE W. JONES and CHRISMAN-SAWYER BANK,	)	
Defendants.	)	

DEPOSITION OF JOSEPHINE ANTOINETTE FRICK,

produced, sworn and examined on Friday, the 30th day of August, 1985, between the hours of 8:00 o'clock in the forenoon and 6:00 o'clock in the afternoon of that day, at the law offices of Blackwell, Sanders, Matheny, Weary & Lombardi, 600 Five Crown Center, 2480 Pershing Road, Kansas City, Missouri, before:

SUSAN G. BYERS, C.S.R.
Registered Professional Reporter
of
JAY E. SUDDRETH & ASSOCIATES
450 Ozark National Life Building
906 Grand Avenue
Kansas City, Missouri 64106
(816) 471-2211

a Certified Shorthand Reporter within and for the State of Kansas (the character of the Notary having been expressly waived by the parties herein);

Taken on behalf of Defendants pursuant to Notice to take Depositions.

* * *

EXHIBIT "F"

(p. 25) Q What else did he say to you?

A. That's all, sir.

Q. Has your telephone ever been tapped?

A. Yes, sir.

Q. Who tapped it?

A. I assume my husband, John William Frick.

Q. Do you know what he has on those recordings?

A. No, I don't.

Q. Do you know who the conversations were with?

A. No, I don't

Q. Were those recordings made while you were living with your husband, John Frick?

A. No, he was out of the home at the time.

MR. PICKETT: Do you mean he was no longer living there?

A. Yes, he was no longer living there.

Q. (BY MR. SANDERS) Have you ever been able to learn anything at all about what evidence he has in those taped telephone conversations of yours?

MR. PICKETT: Object to the form of the question. It implies something of that nature, it rises to a level of what legally is called

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EXHIBIT "G"

(p. 26) evidence, therefore, I object to the form of the question, calls for –

MR. SANDERS: I'll reword it.

MR. PICKETT: I'm not through yet. Are you withdrawing your question?

MR. SANDERS: Yes.

Q. (BY MR. SANDERS) Do you have any idea of what information or conversations are recorded –

A. No, sir, I wouldn't have –

Q. – in those recordings that your husband made when he tapped your telephone?

A. No, sir, I wouldn't have any idea.

Q. Do you know what prompted your husband to tap your telephone?

MR. PICKETT: Object to the form of the question. Calls for the mental state of mind of somebody else, calls for speculation and conjecture.

Go ahead.

A. No, I don't.

Q. (BY MR. SANDERS) What has been your relationship with Dr. Whitley, your physician?

A. My relationship with Dr. Whitley is he is my doctor, first off, has been since 1978, since my husband and my separation we have been to

* * *

EXHIBIT "H"

(p. 36) Q Yes, there is on the first floor.

A. Okay.

Q. Where else have you been to dinner, we have mentioned the American Restaurant, the Raphael Hotel?

A. I can't remember the others.

MR. PICKETT: Just your best recollection is all you are entitled to.

Q. (BY MR. SANDERS) Were you married at the time?

A. I am still married, sir.

Q. Was he married?

A. No, sir.

Q. Did he know you were married?

A. I was separated, sir.

Q. Did he know you were married?

A. Yes, sir.

Q. Have you had any telephone conversations with Dr. Whitley?

A. Yes, sir.

Q. Do you know if your husband recorded any of those telephone conversations with Dr. Whitley?

A. I have no idea.

Q. Have you ever asked your husband if he had any recordings?

EXHIBIT "I"

(p. 37) A I have asked my husband if he has recordings, yes, tapes, yes.

Q. What has he told you?

A. No, he has no tapes.

MR. PICKETT: That's what he told you?

THE WITNESS: Yes, sir.

MR. PICKETT: You have to make that clear for the record.

Q. (BY MR. SANDERS) How did you discover that the was tapping your telephone?

A. Ed Spalty, which was my attorney at that time, I think Mr. Albano told Ed Spalty that John had been wiretapping my phone.

Q. Have you ever said any words of endearment or affection to Dr. Whitley?

A. I can't think of any, no, sir.

Q. Has he ever said any to you?

A. I can't think of any, no, sir.

Q. Well, we also subpoenaed today, but he had to go out of town, one David Andes, do you know Mr. Andes?

A. Yes, sir.

Q. Have you had sexual relations with Mr. Andes?

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JOSEPHINE A. ANDES, Plaintiff,	)	
v.	)	Case No. 88-1152-CV-W-6
LESLIE E. ALBIN, AND THEODORE R. KNOX, Defendants.	)	(Filed Apr. 17, 1989)

REPLY SUGGESTIONS IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

COMES NOW Defendant Knox, by and through counsel, and, in support of his Motion for Judgment on the Pleadings, states as follows:

1. 18 U.S.C. Section 2520(e) requires that a lawsuit under this section cannot be brought later than two years after the date upon which the Plaintiff first has a *reasonable opportunity to discover* the violation. (Emphasis added.)

2. Courts have discussed the issue of when a cause of action under Section 2520 accrues. *See Brown v. American Broadcasting Company,* 704 F.2d 1296 (4th Cir. 1983) (when plaintiff discovers that communications have been intercepted); *Smith v. Nixon,* 606 F.2d 1183 (D.C. Cir. 1979) (when through the exercise of reasonable diligence plaintiff could have discovered the existence of the wiretap); *Awbrey v. Great Atlantic & Pacific Tea Company,* 505 F. Supp. 604 (D.C. Ga. 1980) (when the plaintiff discovers

that phone calls were being intercepted); *Cole v. Kelley*, 438 F. Supp. 129 (C.D. Cal. 1977) (when plaintiff acquires knowledge that he may have a potential claim). Plaintiff admits in her Suggestions in Opposition that she "discovered the illegal wiretapping on or about December 7, 1984." (See p. 1). Plaintiff's contention that because she did not know the names of all the parties that may have been involved in the wiretapping, the statute of limitations tolls, is clearly an erroneous statement of the law. Section 2520(e) and case law indicate that the statute of limitations begins to run at the time plaintiff discovers or through exercise of due diligence could have discovered the existence of the wiretap. The identity of Defendant Knox and his alleged participation in the installation of electronic surveillance equipment could have been learned upon the timely filing of this lawsuit through the discovery process.

3. In *Newcomb v. Ingle*, the Tenth Circuit affirmed the district court's ruling that the filing of a motion to suppress intercepted recordings established the plaintiff's actual knowledge of a violation and, therefore, barred his Section 2520 claim. 827 F.2d 675, 679 (10th Cir. 1987). The plaintiff contended that the defendant fraudulently concealed a conspiracy to use the tapes illegally in a criminal proceeding against him, and therefore the statute should be tolled. The court rejected that argument, concluding "as set out in [the plaintiff's] own pleadings, there is no potential for a cognizable issue of fact on a theory of fraudulent concealment." *Newcomb*, 827 F.2d at 679. As in the case at hand, as set out in Plaintiff's own pleadings in this case and in the pleadings of the prior divorce action (attached to Defendant's Suggestions in Support of

Motion for Judgment on the Pleadings), there is no potential for a cognizable issue of fact as to when the Plaintiff discovered a violation of Section 2520. Therefore, Plaintiff's cause of action against Defendant Knox is barred by the statute of limitations.

WHEREFORE, for the reasons stated herein and in his Suggestions in Support of the Motion for Judgment on the Pleadings, Defendant Knox respectfully moves this court to grant his Motion for Judgment on the Pleadings and any and all other relief this court deems just and proper.

Respectfully submitted,

KOENIGSDORF & WYRSCH, P.C.

By: /s/ Michael P. Joyce
JAMES R. WYRSCH #20730
MICHAEL P. JOYCE #38501
1006 Grand Avenue
Tenth Floor
Kansas City, MO 64106
(816) 221-0080
ATTORNEY FOR DEFENDANT

I hereby certify that a copy of the foregoing was mailed this 17th day of April, 1989, to:

William H. Pickett
417 E. 13th Street
Kansas City, MO 64106

/s/ Michael P. Joyce
Attorney for Defendant

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

In Re the Marriage of:	)	
	)	
JOSEPHINE ANTIONETTE FRICK,	)	Case No. DR84-1285
Petitioner,	)	Division 10
v.	)	
JOHN WILLIAM FRICK,	)	
Respondent.	)	

MEMORANDUM OF PETITIONER
REPORTING STATUS OF DISCOVERY
ISSUES POST MEETING OF COUNSEL

COMES NOW Petitioner, through her attorneys, and herewith submits the following report of the meeting between counsel for the parties and Mr. David Stover, attorney for Roger Prock per the Court's Order of November 27, 1984:

Respondent's Motion for Protective Order

Respondent moved to limit access to records of businesses in which he is involved on the basis that confidential information might disseminate to competitors or others for an improper purpose. Petitioner also has such concerns although no protective order effort on her behalf has been made at this time.

1. Areas of Agreement:

The parties agree only to use information obtained during the course of discovery for the purpose of this action and to refrain from disclosing same to competitors,

etc. Of course, admissable evidence so obtained may be used in depositions or at trial.

2. Areas of Disagreement:

None.

Petitioner's First and Second Requests for Production of Documents

Petitioner has filed her First and Second Requests for Production of Documents which ask respondents to produce various business records of his, J R Management Company, Prock Drug Co., Inc. and MoWinco, Inc.. Respondent has not produced documents in response to the First Request as the same is subject to his Motion for Protective Order. The Second Request sought production on December 6 but there has been no response to this as well. Respondent objects that the Requests are burdensome and oppressive in their scope. Respondent and his business associate, Mr. Roger Prock, whose interests were represented by attorney David Stover at the meeting, also are concerned that certain personal financial information of Mr. Prock's might be disclosed. Petitioner requires the information to value the businesses since she is co-signer of a note for Prock Drug, Inc. and the shares in said concern together with MoWinco, Inc. are marital property. J R Management Company was also operated during the marriage and respondent was involved therein.

1. Areas of Agreement:

The parties agree that appraisals of the value of any interests owned jointly or separately in Prock Drug Company, Inc., MoWinco, Inc. and J R Management Co. are

appropriate. An appraisal of the value of certain stock in petitioner's name in Hamiltonian Industries is appropriate as well although respondent has not yet commenced discovery in this regard.

The parties and Mr. Stover generally agree that documents or things pertaining solely to respondent's activities, assets or interests may be obtained by petitioner. In addition, records from Prock Drug, MoWinco and J R Management for the past five (5) years would be appropriate for petitioner to obtain.

Petitioner's attorneys have agreed to further confer with the accountants retained to appraise this property in an effort to cull certain documents from the First and Second Requests to reduce the amount of paperwork involved. The accountants will write to Mr. Albano and include this list in said correspondence. Respondent and the businesses will produce the documents listed so long as petitioner reduces the number of documents requested. The parties also recognize that on-site inspections are appropriate and the same will be allowed. All individuals involved including personnel of the various businesses will be cooperative and courteous. Photocopies will be made available upon request at a reasonable charge.

2. Areas of Disagreement or No Agreement and Reasons Therefore:

Petitioner has indicated that prior to the marriage approximately six (6) years ago and shortly thereafter she worked for the drug concerns and certain of her pay was

diverted into the business. Petitioner requests the document time limitation be extended to include any such period if the requested documents concern this subject.

The subject will remain open until a refined list of business records is presented. Counsel for the parties and Mr. Stover will cooperate in resolving issues related to. this particular discovery.

Petitioner, other than one or two Interrogatories, has not received any discovery requests concerning the Hamiltonian Industries stock and any issue in this regard necessarily may not be resolved at this time. Petitioner does have a limited amount of access to this information.

Motion for Contempt Against CharterBank

Petitioner noticed up and took the deposition of the custodian of records of CharterBank of Independence. Petitioner subpoenaed the contents of a $740,000 loan file upon which she is a co-signer. The records custodian refused to produce various records in the file except for the note and security agreement which bore petitioner's signature. Petitioner moved to have the custodian held in contempt. Respondent, not the bank or Mr. Roger Prock, prior to the date and time noticed for the deposition, moved for a protective order on the ground certain of the documents contained personal financial information. The bank felt it could not produce the entire file without risking liability to Mr. Prock.

1. Areas of Agreement:

The parties agree that the bank may provide the entire contents of the loan file to the Court for incamera

inspection. Respondent will submit those documents he has that are also in the loan file to the Court. Except for the documents listed below and upon verification that the same documents appear in the bank file, the petitioner will accept same from respondent rather than the bank.

2. Areas of Disagreement or No Agreement and Reasons Therefor:

The petitioner will persist in attempting to obtain the bank records respondent does not have.

Mr. Prock's attorney, Mr. Stover, insists that a personal financial statement and an appraisal of real property exclusive to Mr. Prock are not discoverable. Petitioner believes they are discoverable as their production is calculated to lead to the discovery of admissable evidence. The respondent and Mr. Prock were and are closely engaged in joint business ventures, including at one time a partnership. The financial statement may include valuations by Mr. Prock of the businesses which would be relevant to the appraisals of respondent's interests in said businesses. This information is not privileged and there is otherwise no bar to discovery of it.

Petitioner also is in disagreement with the present description of the contents of the file. The records custodian of the bank stated an inventory of the drug stores was in the file and the deposition clearly shows he viewed the file just a short time before making this statement. There is also no set of audited financial statements in this file.

No agreement could be reached with respect to petitioner's request for costs and attorneys fees in connection

with the fruitless deposition of the bank's record custodian.

Motion to Compel
Answers to Interrogatories and
Motion for Sanctions

1. Areas of Agreement:

The parties agreed generally that if the other party answered all pending Interrogatories that Motions for Sanctions would either be withdrawn or not filed.

2. Areas of Disagreement or No Agreement and Reasons Therefor:

Petitioner will answer all pending Interrogatories to her but would preserve objections, if any, for the trial and by answering would not waive the same. Petitioner suggests that if respondent would do likewise then petitioner would refrain from filing a Motion for Sanctions as well.

Petitioner will determine her course with respect to a Motion for Sanctions upon hearing whether respondent will answer all non-answered portions of the First and Second Interrogatories to respondent.

Petitioner's Motion for Temporaries

Petitioner seeks temporary maintainance, attorneys fees, suit monies, restraining order and injunction.

1. Areas of Agreement:

The parties agree to an order prohibiting the parties from communicating with each other at their places of

employment. Respondent shall be excluded from the family home and shall not threaten to or actually break into the home.

2. Areas of Disagreement or No Agreement and Reasons Therefor:

The respondent will not pay any temporary attorneys fees or suit monies because he asserts he has his own litigation and appraisal expenses and he alleges petitioner is employed and has a recent inheritance. Petitioner asserts respondent earns approximately twice her earnings, she has recently been unable to work, and she is not so capable given her present obligations, particularly that of a minor son not born of the marriage.

The respondent cannot agree to temporary maintainance beyond his paying one-half of the monthly mortgage payment of approximately $1,200, which obligation is presently in default. The petitioner seeks respondent to pay this mortgage payment as he has been making it in the past and she has other substantial bills such as medical bills and child care for her minor son. She also requests additional maintainance so that she may maintain the living standard acquired during the marriage.

The respondent has agreed to reconsider his position upon receipt of bills and a list of debts from petitioner and these will be provided.

The parties have also discussed selling marital assets to pay current debts. Petitioner desires to sell the bass boat in respondent's possession. Respondent desires to sell the Blazer in petitioner's possession.

Further Discovery

Respondent desires depositions of petitioner and Mr. C. W. Jones and perhaps others. Petitioner desires depositions of respondent and Mr. Roger Prock and perhaps others.

1. Areas of Agreement:

Petitioner and respondent's depositions will be scheduled on convenient dates subject to the provisos set forth below.

2. Areas of Disagreement or No Agreement and Reasons Therefor:

Petitioner cannot produce Mr. Jones as he is not a party and can be deposed only pursuant to a subpoena personally served upon him.

Respondent asserts that Mr. Jones is and has been represented by a partner of the firm which represents petitioner herein, and that Mr. Jones' previous subpoena was released as a result of negotiations with said partner over a conflict preventing the witness from appearing pursuant to said subpoena.

Petitioner intends to file a protective order prohibiting further discovery by respondent pending depositions of him and perhaps others. Petitioner has located a potentially illegal wire tap in the home and her attorneys have seen and had read to them by respondent's attorneys certain transcripts of petitioner's private telephone conversations with persons other than respondent. These wiretaps may have included eavesdropping upon communications between petitioner and her attorneys. Petitioner would be severely prejudiced in proceeding with

discovery without immediate access to the manner in which these transcripts were obtained and the contents thereof.

Respectfully submitted,
DIETRICH, DAVIS, DICUS,
ROWLANDS,
SCHMITT & GORMAN

By /s/ Edward R. Spalty
Edward R. Spalty #26086
Philip A. Klawuhn #31012
1700 City Center Square
1100 Main Street
Kansas City, Missouri 64105
(816) 221-3420

ATTORNEYS FOR
PETITIONER

Certificate of Hand-Delivery

I hereby certify a copy of the foregoing was hand-delivered this 10th day of December, 1984, to Ms. Rose Anne Nespica, 219 North 7 Highway, Blue Springs, Missouri and to Mr. Michael J. Albano, 311 West Kansas, Independence, Missouri, attorneys for respondent.

/s/ Edward R. Spalty
ATTORNEY FOR PETITIONER

IN THE CIRCUIT COURT OF
JACKSON COUNTY MISSOURI

In Re the Marriage of:	)	
JOSEPHINE ANTIONETTE FRICK,	)	
Petitioner,	)	Case No. DR84-1285
vs.	)	
JOHN WILLIAM FRICK,	)	
Respondent.	)	

MOTION FOR PROTECTIVE ORDER

COMES NOW the petitioner, Jo Ann Frick, through her attorneys, and herewith moves for a protective order against a certain Notice to Take Deposition attached hereto as Exhibit A and incorporated herein. This discovery should not be had for the following reasons:

1. Insufficient notice of the time and place of the deposition was given to the petitioner and her attorneys. The Notice, Exhibit A, purports mailing to petitioner's attorneys occurred on February 9, 1985. However, the envelope in which same was enclosed, a copy of which is attached as Exhibit B and incorporated herein, is clearly postmarked February 11, 1985. Said Notice was not received by petitioner's attorneys until February 13, 1985. This is not sufficient notice for a deposition on February 18, 1985.

Even assuming that the Notice was mailed on February 9, 1985, such Notice would nonetheless be insufficient. Missouri Supreme Court Rules 57.03(b) and 44.01(e) require ten days notice, excluding the date of mailing, when a notice to take deposition is served in that manner.

2. Petitioner should be protected from further discovery in this case until at least after certain wiretapped conversations are made available to her and her attorneys. In fact, respondent, through her attorneys, agreed not to undertake further discovery until after recordings of the wiretapped conversations were produced for petitioner. To do otherwise would be oppressive to petitioner and would allow unfair advantage to be taken by respondent from his or his agent's clearly illegal acts.

3. The deposition is noticed for the day when Washington's birthday is to be observed, and is therefore impermissably scheduled on a legal holiday and to allow same to proceed would be oppressive as well.

4. Petitioner's attorney, Edward R. Spalty, has a previous engagement on that day. A business meeting has been scheduled on that date which will involve an out of town participant whose travel schedule cannot be changed.

WHEREFORE, petitioner prays for the Court's protective order providing that the discovery requested in the Notice to Take Deposition on February 18, 1985 not be had.

Respectfully submitted,

DIETRICH, DAVIS, DICUS,
ROWLANDS, SCHMITT
& GORMAN

By /s/ Philip A. Klawuhn
Edward R. Spalty #26086
Philip A. Klawuhn #31012
1700 City Center Square
1100 Main Street
Kansas City, Missouri 64101
(816) 221-3420

ATTORNEYS FOR PETITIONER

Certificate of Mailing

I hereby certify that a copy of the foregoing Motion for Protective Order was mailed via U. S. Mail, postage prepaid, this 14th day of February, 1985, to: Ms. Rose Anne Nespica, 219 North 7 Highway, Blue Springs, Missouri, 64015 and Mr. Michael J. Albano, 311 West Kansas, Independence, Missouri 64050, attorneys for respondent.

/s/ Philip A. Klawuhn
Attorney for Petitioner

Exhibit A

NOTICE TO TAKE DEPOSITIONS

IN RE: The marriage of:

Josephine Antionette Frick, Petitioner	)	In the Circuit Court of Jackson County, Missouri at ___
VS.	)	
John William Frick, Respondent	)	No. DR84-1285 Div. ___

To the above named Petitioner and Mr. Edward R. Spalty, 1700 City Center Square, 1100 Main, Kansas City, Missouri 64105

YOU ARE HEREBY NOTIFIED, That the depositions of witnesses to be used in evidence on the trial of the above entitled action, in behalf of the Respondent will be taken at the law offices of Paden, Welch, Martin, Albano and Graeff, 311 West Kansas Avenue, in the City

of Independence , County of Jackson , the State of Missouri , on Monday the 18th day of February , 19 85, between the hours of 8 o'clock a.m. and 6 o'clock p.m. and that the taking of the same will be adjourned from day to day, between the same hours, until said depositions are completed.

The hour at which the depositions will be taken is 9:00 A.M.

The deposition of Josephine Antionette Frick is to be taken at this time and place.	)	Rose Anne Hespica Michael J. Albano Attorneys for Respondent
Mailed: February 9, 1985	)	

Exhibit B

(Front of Envelope containing the following information)

GERALD M. HOLCOMB, Court Reporter
Box 1922
Harry S. Truman Station
Independence, Missouri 64055

RECEIVED
PAK
FEB 13 1984

Mr. Edward R. Spalty
1700 City Center Square
1100 Main
Kansas City, Missouri 64015

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

In Re the Marriage of:	)	
JOSEPHINE ANTIONETTE FRICK	)	
Petitioner,	)	Case No.
	)	DR84-1285
vs.	)	
JOHN WILLIAM FRICK,	)	
Respondent.	)	

SUGGESTIONS IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER

In support of her Motion For Protective Order from the deposition to be taken from her on February 18, 1985, petitioner states:

It is a fundamental principal of procedural due process that a party to civil litigation receive adequate notice of a deposition. The standard is manifested in Missouri Supreme Court Rule (hereinafter "Rule") 57.03(b). It states a party desiring to take the deposition of another person:

> " . . . shall give not less than 7 days' notice in writing to every other party to the action."

Rule 44.01(e) adds three days, excluding the day of service, to the amount of notice required when service, such as was attempted here, is made by mail.

Rule 43.01(d) clearly provides that "Service by mail is complete upon mailing." As shown on the envelope within which the notice to take deposition was contained, mailing occurred on the date of the postmark, February 11, 1985. Mailing on such a date is clearly insufficient to

notify petitioner of a February 18, 1985 deposition since there has not been and cannot be ten days' written notice. The notice was not received until February 13, 1985. Even if it had been mailed February 9, there are still not the requisite ten days' notice.

A motion for protective order may also prevent the discovery from proceeding "to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense". Rule 56.01(c). Respondent's attorneys have indicated they have tapes and transcriptions of telephone conversations between petitioner and persons other than respondent. They have also stated that these were obtained as a result of a wiretap respondent or his agents established on petitioner's telephone line in her home.

Such wiretapping and taping is clearly illegal and the making and dissemination of same is prohibited under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §§2510-2520; *Stamme v. Stamme*, 589 S.W.2d 50 (Mo. App. 1979) (Federal statute making it a criminal offense to willfully intercept any wire or oral communication or to use the contents thereof applies to interspousal wiretaps, and evidence obtained by interspousal wiretaps was not admissable in a dissolution of marriage proceeding). *See also, Kratz v. Kratz*, 477 F. Supp 463 (D. Penn. 1979).

It would clearly be oppressive and unfair to allow respondent to take the petitioner's deposition while respondent has illegally obtained tape recordings of petitioner's telephone conversations, without at least

petitioner first having the opportunity to know the contents of said recordings.

The deposition is noticed for the day upon which Washington's birthday is to be observed and petitioner's appearance cannot be compelled on this legal holiday (Rule 44.01). Additionally, petitioner's attorney, Mr. Edward Spalty, is committed to attend a meeting on February 18 which cannot be changed since an out of town participant cannot change his travel plans.

Respectfully submitted,
DIETRICH, DAVIS, DICUS,
ROWLANDS, SCHMITT
& GORMAN

By /s/ Philip A. Klawuhn
Edward R. Spalty #26086
Philip A. Klawuhn #31012
1700 City Center Square
1100 Main Street
Kansas City, Missouri 64105
(816) 221-3420

ATTORNEYS FOR PETITIONER

Certificate of Mailing

I hereby certify that a copy of the foregoing Suggestions in Support of Motion for Protective Order was mailed via U. S. Mail, postage prepaid, this 14th day February, 1985, to: Ms. Rose Anne Nespica, 219 North 7 Highway, Blue Springs, Missouri, 64015 and Mr. Michael J. Albano, 311 West Kansas, Independence, Missouri 64050, attorneys for respondent.

/s/ Philip A. Klawuhn
Attorney for Petitioner

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

In Re the Marriage of:	)	
	)	
JOSEPHINE ANTIONETTE FRICK,	)	
Petitioner,	)	Case No. DR84-1285
vs.	)	
	)	
JOHN WILLIAM FRICK,	)	
Respondent.	)	

MOTION TO QUASH SUBPOENA AND FOR PROTECTIVE ORDER FROM DEPOSITION

COMES NOW petitioner, JoAnn Frick, through her attorneys, and herewith moves for the Court's Order quashing the subpoena for deposition to Mr. C. W. Jones, notice of which is attached hereto as Exhibit A, and issuing a protective order providing said discovery not be had. This relief is appropriate for the reasons that:

1. Respondent is in possession of illegally made tape recordings of wiretapped conversations of petitioner with persons other than respondent. Respondent's attorneys have indicated that C. W. Jones was one of the parties whose conversations with the petitioner were intercepted. It would be oppressive to petitioner to require her to proceed without her first having access to these recordings.

Said recordings and transcriptions were requested by petitioner in her First Request for Production of Documents filed and serve on September 7, 1984. These items have not been produced by respondent. Additionally, during a discovery conference ordered by the Court (a

report of which was filed herein on December 10, 1984) counsel for respondent agreed to suspend discovery until after the tapes were made available.

2. The deposition is scheduled for a legal holiday set aside for the observance of Washington's birthday and cannot be held on such a date. In addition, petitioner's attorney, Mr. Edward Spalty, is otherwise engaged for a business meeting which cannot be rescheduled.

WHEREFORE, petitioners prays for the Court's Order providing that the subpoena to take deposition to Mr. C. W. Jones be quashed and for a protective order directing said discovery not be had.

Respectfully submitted,
DIETRICH, DAVIS, DICUS,
ROWLANDS, SCHMITT
& GORMAN
By /s/ Philip A. Klawuhn
Edward R. Spalty #26086
Philip A. Klawuhn #31012
1700 City Center Square
1100 Main Street
Kansas City, Missouri 64105
(816) 221-3420

ATTORNEYS FOR PETITIONER

Certificate of Mailing

I hereby certify that a copy of the foregoing Motion To Quash Subpoena And For Protective Order From Deposition was mailed via U. S. Mail, postage prepaid, this 14th day of February, 1985, to: Ms. Rose Anne Nespica, 219 North 7 Highway, Blue Springs, Missouri,

64015 and Mr. Michael J. Albano, 311 West Kansas, Independence, Missouri 64050, attorneys for respondent.

/s/ Philip A. Klawuhn
Attorney for Petitioner

EXHIBIT A

NOTICE TO TAKE DEPOSITIONS

IN RE: The marriage of:

Josephine Antionette Frick, Petitioner	)	In the Circuit Court of Jackson County, Missouri at ___
vs.	)	
John William Frick, Respondent	)	No. DR84-1285 Div. ___

To the above named Petitioner and attorney Mr. Edward R. Spalty, 1700 City Center Square, 1100 Main, Kansas City, Missouri 64105

YOU ARE HEREBY NOTIFIED, That the depositions of witnesses to be used in evidence on the trial of the above entitled action, in behalf of the Respondent will be taken at the law offices of Paden, Welch, Martin, Albano and Graeff, 311 West Kansas Avenue, in the City of Independence, County of Jackson the State of Missouri, on Monday the 18th day of February, 1985, between the hours of 8 o'clock a.m. and 6 o'clock p.m. and that the taking of the same will be adjourned from day to day, between the same hours, until said depositions are completed.

The hour at which the depositions will be taken is 3:00 P.M.

The deposition of Mr. C. W. Jones is to be taken at this time and place.	) Rose Anne Nespica and) Michael J. Albano)) Attorney for Respondent.
Mailed: January 29, 1985	)

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

In Re the Marriage of:	)	
JOSEPHINE ANTIONETTE FRICK,	)	
Petitioner,	)	Case No. DR84-1285
vs.	)	
JOHN WILLIAM FRICK,	)	
Respondent.	)	

SUGGESTIONS IN SUPPORT OF PETITIONER'S MOTION TO QUASH SUBPOENA TO TAKE DEPOSITION AND FOR PROTECTIVE ORDER

In support of her Motion to Quash the subpoena to take deposition of C. W. Jones on February 18, 1985, petitioner states:

Allowing the deposition to proceed would be highly prejudicial and oppressive to petitioner. The respondent and his attorneys possess recordings and transcriptions of wiretapped communications between petitioner and persons other than respondent. Such wiretapping, conducted by or at the direction of respondent, was done after he moved from the residence and while petitioner harbored a reasonable expectation of privacy in said residence and in the telephone system therein.

Such conduct is clearly illegal and the fruits thereof inadmissable in evidence. *See,* 18 U.S.C.A. §§ 2510-2520; *Stamme v. Stamme,* 589 S.W. 2d 50 (Mo. App. 1979) (Federal Statute making it a criminal offense to willfully intercept any wire or oral communication or to use the contents thereof applies to interspousal wiretaps, and

evidence obtained by interspousal wiretaps was not admissable in a dissolution of marriage proceeding). *See also, Kratz v. Kratz*, 477 F. Supp. 463 (D. Penn. 1979).

The Court, under Missouri Supreme Court Rule 56.01(c), has the authority to prevent discovery from proceeding "to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense." Petitioner submits to allow the deposition of C. W. Jones to proceed would be highly oppressive in view of the illegal wiretap. Respondent's attorneys have indicated conversations between Mr. Jones and the petitioner were intercepted.

Counsel for the parties recently met to discuss discovery issues at the request of the Court. Counsel for respondent agreed that it would be appropriate for petitioner to have access to the intercepted material before their discovery proceeded.

Respondent is now and since September 30, 1984, has been under the duty to provide said tapes and transcriptions. Request No. 16 of petitioner's First Request For Production Of Documents filed and served on September 7, 1984, requested:

> "Any and all documents or things pertaining to any investigation or surveillance of your spouse herein, including but not limited to investigation reports, correspondence, activity logs, photographs, tape recordings, films or video tapes and any documents or things obtained by or during the course of any such investigation or surveillance."

This request has not yet been met, even though respondent's counsel agreed to do so at the recent discovery conference.

The subpoena to take deposition should be quashed and protective order issued for the additional reasons that it is scheduled on a national holiday, Washington's birthday, Rule 44.01, and attorney Edward Spalty has another engagement which cannot be cancelled.

For the foregoing reasons, petitioner respectfully suggests the Court's order quashing the subpoena to take deposition and providing this discovery not be had.

Respectfully submitted,

DIETRICH, DAVIS, DICUS, ROWLANDS,
SCHMITT & GORMAN
By /s/ Philip A. Klawuhn
EDWARD R. SPALTY #26086
PHILIP A. KLAWUHN #31012
1700 City Center Square
1100 Main Street
Kansas City, Missouri 64105
(816) 221-3420

Attorneys for Petitioner

Certificate of Mailing

I hereby certify that a copy of the foregoing Suggestions In Support Of Petitioner's Motion To Quash Subpoena To Take Deposition And For Protective Order was mailed via U.S. Mail, postage prepaid, this 14th day of February, 1985, to: Ms. Rose Anne Nespica, 219 North 7 Highway, Blue Springs, Missouri, 64015 and Mr. Michael J.

Albano, 311 West Kansas, Independence, Missouri 64050, attorneys for respondent.

/s/ Philip A. Klawuhn
Attorney for Petitioner

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

In Re the Marriage of:	)	
JOSEPHINE ANTIONETTE FRICK,	)	
Petitioner,	)	Case No. DR84-1285
vs.	)	
JOHN WILLIAM FRICK,	)	
Respondent.	)	

MOTION FOR PROTECTIVE ORDER
FROM DEPOSITION

COMES NOW petitioner, JoAnn Frick, through her attorneys, and herewith moves that the Court issue a protective order providing that the deposition noticed for her on March 28, 1985 not be had. This relief is appropriate for the reasons that:

1. Attorneys for respondent are required by the Missouri Supreme Court Rules to give petitioner ten days notice, exclusive of the day of mailing, of her deposition.

The instant notice to take depositions purports to have been mailed on March 18, 1985 but mailing on that date is not sufficient to provide ten days notice of the deposition exclusive of the date of mailing. In any event, it does not even appear that the notice was mailed on March 18, 1985, since the postmark is dated March 19, 1985.

2. Petitioner is informed and believes that respondent or his representatives are in possession of illegally made tape recordings of wiretapped conversations of

petitioner. As stated in petitioner's Motion to Quash Subpoena and For Protective Order From Deposition, filed February 15, 1985, it would be oppressive to petitioner to require her to proceed without her first having access to these recordings.

WHEREFORE, petitioner prays that the Court issue a protective order providing that the deposition of the petitioner noticed for March 28, 1985 not be had.

Respectfully submitted,

DIETRICH, DAVIS, DICUS, ROWLANDS, SCHMITT & GORMAN
By /s/ Philip A. Klawuhn
EDWARD R. SPALTY #26086
PHILIP A. KLAWUHN #31012
1700 City Center Square
1100 Main Street
Kansas City, Missouri 64105
(816) 221-3420

Attorneys for Petitioner

– Certificate of Mailing

I hereby certify that a copy of the foregoing Motion For Protective Order From Deposition was mailed via U.S. Mail, postage prepaid, this 26th day of March, 1985, to: Ms. Rose Anne Nespica, 219 North 7 Highway, Blue Springs, Missouri, 64015 and Mr. Michael J. Albano, 311 West Kansas, Independence, Missouri 64050, attorneys for respondent.

/s/ Philip A. Klawuhn
Attorney for Petitioner

EXHIBIT "A"

NOTICE TO TAKE DEPOSITIONS

Josephine Antionette Frick,	)	
Petitioner	)	In the Circuit Court of Jackson County, Missouri at No. DR84-1285 Div. ___
VS.	)	
John William Frick,	)	
Respondent	)	

To the above named Petitioner and attorney Mr. Edward R. Spalty, 1700 City Center Square, 1100 Main Street, Kansas City, Missouri 64105

YOU ARE HEREBY NOTIFIED, That the depositions of witnesses to be used in evidence on the trial of the above entitled action, in behalf of the Respondent will be taken at the law offices of Paden, Welch, Martin, Albano and Graeff, 311 West Kansas Avenue in the City of Independence, County of Jackson, the State of Missouri, on Thursday the 28th day of March, 1985, between the hours of 8 o'clock a.m. and 6 o'clock p.m. and that the taking of the same will be adjourned from day to day, between the same hours, until said depositions are completed.

The hour at which the depositions will be taken in 9:30 A.M.

The deposition of Josephine A. Frick is to be taken at this time and place.	)	Mr. Michael Albano Ms. Rose Anne Nespica Attorney for Respondent
Mailed: March 18, 1985	)	

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

In Re the Marriage of:	)	
JOSEPHINE ANTIONETTE FRICK,	)	
Petitioner,	)	Case No. DR84-1285
vs.	)	
JOHN WILLIAM FRICK,	)	
Respondent.	)	

SUGGESTIONS IN SUPPORT OF PETITIONER'S MOTION FOR PROTECTIVE ORDER

In support of her Motion For Protective Order From Deposition of petitioner on March 28, 1985, petitioner states:

Missouri Rule of Civil Procedure 57.03(b)(1) states that a party desiring to take the deposition of any person upon oral examination shall not give less than 7 days' notice in writing to every party to the action. In addition, Rule 44.01(e) states that when a notice is served upon a party by mail, three days are added to the proscribed period. Finally, Rule 44.01(a) states that in computing any period of time prescribed by these rules, the day of the act, event or default after which the designated period of time begins to run is not to be included. Consequently, attorneys for respondent, by mailing notice on March 19, 1985 of the deposition of petitioner on March 28, 1985, have failed to provide sufficient notice under the Missouri Rules of Civil Procedure.

As was stated in Suggestions in Support of Petitioner's Motion to Quash Subpoena to Take Deposition and For Protective Order filed on February 15, 1985, allowing this deposition to proceed would be highly prejudicial and oppressive to petitioner. The respondent and his attorneys possess recordings and transcriptions of wiretapped communications between petitioner and persons other than respondent. Such wiretapping, conducted by or at the direction of respondent, was done after he moved from the residence and while petitioner harbored a reasonable expectation of privacy in said residence and in the telephone system therein.

Such conduct is clearly illegal and the fruits thereof inadmissable in evidence. *See,* 18 U.S.C.A. §§ 2510-2520; *Stamme v. Stamme,* 589 S.W. 2d 50 (Mo. App. 1979) (Federal Statute making it a criminal offense to willfully intercept any wire or oral communication or to use the contents thereof applies to interspousal wiretaps, and evidence obtained by interspousal wiretaps was not admissable in a dissolution of marriage proceeding). *See also, Kratz v. Kratz,* 477 F. Supp. 463 (D. Penn. 1979).

The Court, under Missouri Supreme Court rule 56.01(c), has the authority to prevent discovery from proceeding "to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense."

These recordings and transcriptions were requested by petitioner in her First Request for Production of Documents filed on September 7, 1984. Also, during a discovery conference ordered by the Court, a report of which was filed on December 10, 1984, counsel for respondent

agreed to suspend discovery until after the tapes were made available. Respondent has not to date produced these items.

Petitioner cannot be certain that the Court overruled its Motion to Quash Subpoena and For Protective Order From Deposition, filed February 15, 1985, based on the rejection of the above-mentioned argument. Petitioner again advances said argument in this Motion in order that she is not interpreted to have abandoned or waived her objection to respondent's refusal to provide the illegally obtained tape recordings prior to the taking of her deposition.

For the foregoing reasons, petitioner respectfully suggests the Court's protective order from the deposition of petitioner noticed for March 28, 1985.

Respectfully submitted,

DIETRICH, DAVIS, DICUS, ROWLANDS, SCHMITT & GORMAN
By /s/ Philip A. Klawuhn
EDWARD R. SPALTY #26086
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1100 Main Street
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(816) 221-3420

Attorneys for Petitioner

Certificate of Mailing

I hereby certify that a copy of the foregoing Suggestions In Support Of Petitioner's Motion For Protective Order was mailed via U.S. Mail, postage prepaid, this 26th day of March, 1985,

to: Ms. Róse Anne Nespica, 219 North 7 Highway, Blue Springs, Missouri, 64015 and Mr. Michael J. Albano, 311 West Kansas, Independence, Missouri 64050, attorneys for respondent.

/s/ Philip A. Klawuhn
Attorney for Petitioner

(3)

No. 90-403

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

JOSEPHINE A. ANDES,

Petitioner,

vs.

THEODORE R. KNOX,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

William H. Pickett
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QUESTIONS PRESENTED

1.

WHEN PETITIONER'S CLAIM FOR CIVIL DAMAGES UNDER 18 U.S.C. 2520 ARGUABLY ACCRUED IN MISSOURI MORE THAN TWO YEARS PRIOR TO JANUARY 19, 1987, THE EFFECTIVE DATE OF THE TWO-YEAR STATUTE OF LIMITATIONS UNDER 18 U.S.C. 2520(e), IS THE APPLICABLE STATUTE OF LIMITATIONS FOR DETERMINING WHETHER THE SUIT IS TIME-BARRED: (A) THE FEDERAL STATUTE (18 U.S.C. 2520(e)) OR (B) THE APPROPRIATE MISSOURI STATUTE OF LIMITATIONS (SEC. 516.120, R.S.MO. OR SEC. 516.140, R.S.MO.)?

DOES A PLAINTIFF'S CLAIM FOR CIVIL DAMAGES IN A WIRETAP CASE ACCRUE AS TO ALL POTENTIAL DEFENDANTS JOINTLY WHEN THE MERE EXISTENCE OF THE WIRETAP IS DISCOVERED (HERE, DECEMBER 7, 1984), AS SOME CIRCUIT COURTS OF APPEALS HAVE HELD, OR AS OTHERS HAVE HELD, DOES THE CLAIM ACCRUE AS TO EACH DEFENDANT INDIVIDUALLY ON THE DATE WHEN THE PLAINTIFF NOT ONLY KNEW OF THE WIRETAP'S EXISTENCE, BUT KNEW OR SHOULD HAVE KNOWN OF THE IDENTITY OF THE DEFENDANT (HERE, NO LATER THAN DECEMBER 26, 1987)?

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18 U.S.C. Sec. 2520 Recovery of Civil Damages Authorized

(a) In general. Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) Relief. In an action under this section, appropriate relief includes--

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably in-

curred.

(c) **Computation of Damages.**

(1) [Section on damages for satellite signal interception omitted as not relevant]

(2) In any other action under this section, the court may assess as damages whichever is the greater of--

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) **Defense.** A good faith reliance on--

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law

enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) Limitation. A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

Sec. 516.120, R.S.Mo.:

Within five years:

(1) All actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 516.110, and except upon judgments or decrees of a court of record, and except where a different time is herein limited;

(2) An action upon a liability

created by a statute other than a penalty or forfeiture;

(3) An action for trespass on real estate;

(4) An action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated;

(5) An action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud.

Sec. 516.140, R.S.Mo.:

Within two years: An action for libel, slander, assault, battery, false imprisonment, criminal conversation, malicious prosecution, or actions brought

under section 290.140, RSMo. An action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation or for liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, and for the recovery of any amount under and by virtue of the provisions of the Fair Labor Standards Act of 1938 and amendments thereto, such act being an act of Congress, shall be brought within two years after the cause accrued.

REPLY ARGUMENT

1.

WHEN PETITIONER'S CLAIM FOR CIVIL DAMAGES UNDER 18 U.S.C. 2520 ARGUABLY ACCRUED IN MISSOURI MORE THAN TWO YEARS PRIOR TO JANUARY 19, 1987, THE EFFECTIVE DATE OF THE TWO-YEAR STATUTE OF LIMITATIONS UNDER 18 U.S.C. 2520(e), IS THE APPLICABLE STATUTE OF LIMITATIONS FOR DETERMINING WHETHER THE SUIT IS TIME-BARRED: (A) THE FEDERAL STATUTE (18 U.S.C. 2520(e)) OR (B) THE APPROPRIATE MISSOURI STATUTE OF LIMITATIONS (SEC. 516.120, R.S.MO. OR SEC. 516.140, R.S.MO.)?

Defendant's Brief in Opposition has actually raised a third "question presented" which would justify the granting of the Writ of Certiorari: Whether a newly-enacted federal statute of limitations is applicable to causes of action which have arisen prior to enactment of the statute, or whether the appropriate

state statute of limitations existing at the time of the enactment is applicable.

Petitioner has previously argued that under the federal statute, 18 U.S.C. 2520(e), and the decisions in Sohn v. Waterson, 84 U.S. (17 Wall.) 596 (1873); Lewis v. Lewis, 48 U.S. (7 How.) 776 (1849), and Reynolds v. Heartland Transportation, 849 F.2d 1074 (8th Cir. 1988), her suit was timely. Respondent Knox argues that if the federal statute is not applicable, then the controlling Missouri statute of limitations is Sec. 516.140, R.S.Mo. The two-part rationale offered by Respondent is: (1) the tort of invasion of privacy is the most analogous cause of action in Missouri to the federal claim for damages for unauthorized wiretapping; that invasion of privacy is in turn most analogous to defamation cases and therefore the two-year statute of limitations in Sec. 516.140, R.S.Mo., applicable to libel and slander actions,

is applicable to Petitioner's claims in this case, and (2) since wiretapping is an intentional act, and since Sec. 516.140, R.S.Mo., sets the limitation period for intentional torts, Sec. 516.140 is therefore the controlling Missouri statute of limitations.

It is respectfully suggested that Respondent's reliance on this statute and on the cases cited is misplaced. If a Missouri statute of limitations is applicable to Petitioner's claims against Respondent in this matter, the correct statute is Sec. 516.120, R.S.Mo., which provides in pertinent part:

> Within five years:
>
> (4) An action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein

otherwise enumerated;.... [Emphasis added]

The underlying authority for Respondent Knox's reasoning is Board of Regents of the University of the State of New York v. Tomanio, 446 U.S. 478, 100 S. Ct. 1790, 64 L. Ed.2d 440 (1980). This Court held at 446 U.S. at 483-84, 100 S. Ct. at 1794-95:

> Congress did not establish a statute of limitations or a body of tolling rules applicable to actions brought in federal court under Sec. 1983--a void which is common in federal statutory law. When such a void occurs, this Court has repeatedly "borrowed" the state law of limitations governing an analogous cause of action.

Respondent Knox then cites Smith v. Esquire, Inc., 494 F. Supp. 967 (D. Md. 1980) as persuasive authority for the application of the two-year Missouri defa-

mation statute of limitations. As noted by Respondent Knox, this case arose out of a "false light" invasion of privacy theory--and the Supreme Court of Missouri has expressly rejected that theory as a viable tort in this state. Sullivan v. Pulitzer Broadcasting Company, 709 S.W.2d 475, 480-81 (Mo. 1986) (en banc).

The second authority cited by Respondent Knox is Fleury v. Harper & Row, Publishers, 698 F.2d 1022 (9th Cir. 1983). A reading of the facts in that case suggests that the book which was at issue contained defamatory matter about the plaintiffs (thus generating the libel count) and thus the invasion of privacy theory would appear to be "false light" rather than the other theories of recovery included within "invasion of privacy" which involve publication of truthful but private matters. This, combined with the fact that the application of the defamation statute of limitations was based on

a California appellate decision cited in Fleury at 1027, makes the case of little relevance to Respondent's argument.

The key to the irrelevancy of both of these citations is that they involve defamation, whereas Petitioner's claims are based on a disclosure that was truthful, i.e., the wiretapped telephone conversations did in fact occur, but the disclosure was unauthorized, i.e., Petitioner believed her conversations were private and did not consent to their taping or disclosure to any third parties.

Respondent also cites Barber v. Time, Inc., 159 S.W.2d 291 (Mo. 1942) as support for Respondent's comparison of invasion of privacy to defamation, and thus leading to Respondent's conclusion that the Missouri defamation statute of limitations is applicable to this case. It should be noted, however, that the Barber court, at 293, also commented upon the similarity of the right of privacy to

the right to be free from unwanted intentional physical contact:

> The interest which one has to maintain his privacy and to live an individual life, which is the basis of the rule, is similar to the much more strongly protected interest to have one's person free from unwanted intentional physical contacts by others. In some aspects it is similar to the interest in reputation, which is the basis of an action for defamation, since both interests have relation to the opinions of third persons.

However, there is a substantial difference between publication of truthful matters and publication of defamatory matters, and in both Barber and the instant case, the publication was of truthful information: in Barber it was the publication of photographs of plaintiff in a hospital bed with accompanying text iden-

tifying her and commenting upon her condition, while in the instant case it was the disclosure to Respondent Knox and others of supposedly private telephone conversations of Petitioner.

Respondent Knox is correct that no decision of an appellate court in Missouri has addressed the issue of what statute of limitations applies to the tort of invasion of privacy. But Missouri does have an all-encompassing statute of limitations for causes of actions which are not specifically enumerated by the state legislature: the five-year limitation period specified by Sec. 516.120(4), R.S.Mo. The language of that statute is express and precise and unambiguous: it covers all causes of action relating to injuries to the person or rights of another which are not otherwise specifically listed.

No Missouri decision has been cited by Respondent to suggest that the appel-

late courts of this state either have, or would, interpret Sec. 516.140, R.S.Mo. as a statute of limitations to cover every conceivable intentional tort.

Part of the reason for this lack of authority is that Sec. 516.120, R.S.Mo., has been applied for many years to a wide variety of causes of action which were not specifically identified by the Missouri legislature and given a specific period of limitation.

In J.D. v. M.F., 758 S.W.2d 177 (E.D. Mo. App. 1988), the Eastern District of the Missouri Court of Appeals expressly held at 178 what has been obvious from many years of litigation: "Tort actions which are not specifically enumerated by name in other sections come under Sec. 516.120(4)...." The application of this principle barred plaintiff's claims for personal injuries resulting from her father's sexual abuse while she was a minor, since she filed suit more

than nine years after attaining her majority, rather than within five years.

A brief sampling of other cases applying the five-year statute to torts not specifically enumerated is as follows: Brower v. Davidson, Deckert, Schutter & Glassman, P.C., 686 S.W.2d 1 (W.D. Mo. App. 1985) [attorney/accountant malpractice]; Jones v. Rennie, 690 S.W.2d 164 (E.D. Mo. App. 1985) [slander of title]; Rippe v. Sutter, 292 S.W.2d 86 (Mo. 1956) [conspiracy]; Farrow v. Rodrique, 224 S.W.2d 630 (S.D. Mo. App. 1949) [alienation of affections].

It is respectfully suggested that the case law in Missouri is crystal clear that claims sounding in tort for which periods of limitation are not specifically enumerated in Ch. 516, R.S.Mo., are governed by the five-year statute of limitations in Sec. 516.120(4), R.S.Mo., and thus Petitioner's suit was timely under the applicable Missouri statute of limi-

tations.

Petitioner agrees with Respondent's statement of the principle that this Court may affirm a lower court's decision on any ground supported by the record, even though the issue might not have been pleaded, tried, or otherwise referred to in the case below. Blum v. Bacon, 457 U.S. 132, 137 (note 5), 102 S. Ct. 2355, 2359, 72 L. Ed.2d 728 (1982); Bondholders Committee, Marlborough Investment Co. v. Commissioner of Internal Revenue, 315 U.S. 189, 192 (note 2), 62 S. Ct. 537, 539 (1942).

The converse of that principle should also hold true: where there is no support in the record for a lower court's decision, that decision should be reversed. The trial court in this case ruled that the "applicable" statute of limitations barred Petitioner's suit. [Petitioner's Appendix at 16] The only statutes of limitation argued to the

trial court were the federal statute (18 U.S.C. 2520(e)), and the two Missouri statutes (Secs. 516.120 and 516.140, R.S.Mo.). The Eighth Circuit affirmed the District Court's decision "for the reasons set forth in the district court's opinion." [Petitioner's Appendix at 4; 905 F.2d at 190]. Under the decisions in Sohn, Lewis and Reynolds, supra, (cited and argued in the Petition for a Writ of Certiorari), Petitioner's suit was timely under the federal statute. As demonstrated above, Petitioner's claim was timely under the only relevant Missouri statute of limitations.

Given the erroneous application of the law by both the District Court and the United States Court of Appeals for the Eighth Circuit, this is a case well within the ambit of both United States v. Atkinson, 297 U.S. 157, 160, 56 S. Ct. 391, 392 (1936) [holding that appellate courts may take notice of errors not ob-

jected to if the errors are obvious if they "otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings"], and Singleton v. Wulff, 428 U.S. 106, 121, 96 S. Ct. 2868, 2877 49 L. Ed.2d 826 (1976) [holding that federal appellate courts may resolve issues not passed on below in circumstances including, but not limited to, matters where the "proper resolution is beyond any doubt" or where "injustice might otherwise result...."].

The proper resolution of this case should be beyond any doubt where the facts demonstrate both the federal and Missouri statutes of limitations were incorrectly applied by the courts below, and to deprive Petitioner of an opportunity to present her claims to a jury in such circumstances is clearly an example of injustice which "seriously affects the fairness, integrity or public reputation of judicial proceedings."

It is therefore respectfully suggested that the Petition for a Writ of Certiorari be granted.

2.

DOES A PLAINTIFF'S CLAIM FOR CIVIL DAMAGES IN A WIRETAP CASE ACCRUE AS TO ALL POTENTIAL DEFENDANTS JOINTLY WHEN THE MERE EXISTENCE OF THE WIRETAP IS DISCOVERED (HERE, DECEMBER 7, 1984), AS SOME COURTS OF APPEALS HAVE HELD, OR AS OTHERS HAVE HELD, DOES THE CLAIM ACCRUE AS TO EACH DEFENDANT INDIVIDUALLY ON THE DATE WHEN THE PLAINTIFF NOT ONLY KNEW OF THE WIRETAP'S EXISTENCE, BUT KNEW OR SHOULD HAVE KNOWN OF THE IDENTITY OF THE DEFENDANT (HERE, NO LATER THAN DECEMBER 26, 1987)?

The question above is the one presented to the Court in the Petition for a Writ of Certiorari. As required by the Rules of this Court, Petitioner will not re-argue the matters previously raised. This portion of the reply will therefore be confined to two points:

1. The excerpts in Respondent's

Appendix from various court documents in both the federal courts below and in the Circuit Court of Jackson County, Missouri, when read in context with the information provided by Petitioner in her Appendix, simply show that Petitioner was aware that her husband, acting alone or possibly through someone else, had wiretapped her telephone and provided that information to her husband's attorneys. At that point in time there was no reason for her to believe that Respondent Knox was involved in the wiretapping, and nothing Respondent has provided to the Court clearly shows that Petitioner either knew or should or could have known of Respondent's involvement in the wiretapping prior to December of 1987. Respondent argues that it is "Petitioner's burden to bring forth sufficient evidence to allow a reasonable jury to find in her favor." [Respondent's Brief at 12] That is precisely what Petitioner is asking

for the opportunity to do--an opportunity which has thus far been foreclosed by the lower courts' decisions.

2. Respondent notes [Respondent's Brief at 19, footnote 2] that Respondent was acquitted of the federal criminal charges against him arising out of the wiretapping incident. Respondent offers no case law to suggest that this event has any relevance to the civil proceedings, or would be dispositive (or even admissible) since the mere act of wiretapping without authorization gives rise to civil damages.

For the reasons previously stated in the Petition, it is respectfully suggested that the Petition for a Writ of Certiorari should be granted.

CONCLUSION

For all the reasons stated above, as well as in the Petition, Petitioner prays that the Court grant her Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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